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The European Union Charter of Fundamental Rights vs. The Council of Europe Convention On Human Rights And Fundamental Freedoms – A Comparison

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ARTICLE

THE EUROPEAN UNION CHARTER OF
FUNDAMENTAL RIGHTS VS. THE COUNCIL OF
EUROPE CONVENTION ON HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS – A COMPARISON

Frank Emmert & Chandler Piché Carney***

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I. INTRODUCTION

While some regions of the world still do not have supranational structures for the protection of human rights and fundamental freedoms, Europe has two systems that are competing on some levels and complementary on others.¹ The European Court of Human Rights in Strasbourg is the guardian of the European Convention on Human Rights and Fundamental Freedoms and accepts complaints by individuals alleging a breach of one or more Convention articles by acts or omissions of the authorities of one of the forty-seven Contracting Parties of the Council of Europe, provided certain conditions of admissibility are met.² The Court of Justice of the European Union, based in Luxembourg, is the guardian of the EU Charter of Fundamental Rights and decides in specific cases whether acts or omissions of the EU institutions and/or certain acts or omissions of the authorities of one of the twenty-eight Member States of the European Union are in conformity with the guarantees provided in the Charter. While there are differences in geographic coverage and in the substantive scope of

1. According to Karen Alter, when the Cold War ended, there were only six permanent international courts while today there are more than two dozen that have collectively issued almost forty thousand binding legal rulings. See KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014). Thus, Europe is not the only place where some level of forum shopping may be possible. See also Karen J. Alter, *The Multiplication of International Courts and Tribunals after the End of the Cold War*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 63 (Cesare P.R. Romano, Karen J. Alter, & Yuval Shany eds., 2014); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *INT'L LAW & POLITICS* 709-51 (1999).

2. See Eur. COURT OF HUMAN RIGHTS, COUNCIL OF EUR., *BRINGING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, A PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA* (3d ed., 2014).

protection, some cases can and have been brought before both supranational courts.³

Supranational structures are important, in particular, if and when the protection at the national level is inadequate. Problems at the national level can and will occur from time to time even in mature democracies with functioning systems of rule of law. This is evidenced by some of the cases that come to the European Court of Human Rights

3. An example are the well-known cases revolving around the controversy between pro-choice and pro-life proponents in Ireland. In 1983, after a popular referendum, Ireland added a clause to the constitution stipulating that the “[t]he state acknowledges the right to life of the unborn and, with due regard to the right to life of the mother, guarantees in its laws to respect and as far as practicable, by its laws to defend and vindicate that right.” Constitution of Ireland 1937 8th amend. (amended 1983). This has generally been interpreted as a far reaching prohibition of abortion. It forces women seeking an abortion to travel abroad, generally to Northern Ireland, where medically induced abortions are relatively freely available. Several organizations were providing information about these services inside the Irish Republic. The Society for the Protection of Unborn Children (“SPUC”) brought lawsuits against these organizations to prevent them from disseminating information about abortion services in the United Kingdom. One case eventually made it to the European Court of Human Rights (“ECtHR”). In *Case of Open Door and Dublin Well Woman v Ireland*, the ECtHR, in a plenary decision, held that restrictions on counseling services to pregnant women were incompatible with the Freedom of Expression protected by Article 10 of the ECHR. *See generally* *Case of Open Door and Dublin Well Woman v. Ireland*, Application No. 14234/88, Judgment, (Oct. 29, 1992), available at [http://hudoc.echr.coe.int/eng#{"itemid":\["001-57789"\]}](http://hudoc.echr.coe.int/eng#{). A parallel case went before the European Court of Justice (“ECJ”) in Luxembourg. In its judgment of October 4, 1991, the ECJ held that while medical termination of pregnancy is a service (and thus, EU law should protect the right to receive this service in another Member State), the court further held that “. . . it is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit student associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out . . .” *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, Case C-159/90, [1991] E.C.R. I-4686, Judgment ¶ 32. The explanation for the latter decision is that the ECJ took a narrow view analyzing exclusively the free movement of services dimension and not (also) the human rights dimension of the case. EU law only protects the freedom to provide or receive cross-border services. Thus, if Irish organizations provide informational services to Irish women, the matter is one of purely internal dimensions, as long as the organizations are not working for the foreign medical service providers. It is difficult to say whether the ECJ would uphold this decision today, after the entry into force of the European Charter. However, it is worth noting in this context, that the ECtHR more recently held that the ECHR does not as such provide a right to an abortion, in spite of the fact that “there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law.” *Case of A, B and C v. Ireland*, Application No. 25579/05, Judgment of the Grand Chamber (Dec. 6, 2010) ¶ 235.

in Strasbourg from countries like the United Kingdom, France, Germany, Sweden, etc. It is also evidenced by the occasional failure of a highly developed legal system in a mature democracy like the United States, where every now and then we sorely miss a functioning supranational system that would catch and correct most, if not all cases, where the national system has failed to provide adequate solutions.⁴

Obviously, the more problems a country has with rule of law and effective legal remedies at the national level, the more important the supranational systems become, provided the supranational decisions are respected and executed in these countries. In the European context, one indicator of this connection is the number of cases that are brought to Strasbourg from Russia, Ukraine, Turkey, and a handful of other countries that struggle to provide a high level of protection of human rights and fundamental freedoms for their people or at least for certain groups under their jurisdiction. Indeed, of the forty-seven Contracting Parties of the Council of Europe, just five or six are producing between two thirds and three quarters of all complaints brought to the attention of the European Court of Human Rights (ECtHR) every year.⁵

Since the parallel existence of two supranational catalogs of human rights and two supranational courts for their interpretation and enforcement is quite unique, this article will compare some of the strengths and weaknesses of each of the two systems and attempt some proposals for the future development of both of them. For the benefit of less specialized readers, however, we shall first recall the history and evolution and some of the most important features of each of the two systems.

4. Examples are provided in Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L. L. 327 (2000). See also Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14:2 EUR. J. L. REFORM 241-64.

5. At the end of 2016, the total number of cases "pending before a judicial formation" was 79,750. Of these, 18,171 were against Ukraine; 12,575 against Turkey; 8,962 against Hungary; 7,821 against Russia; 7,402 against Romania; and 6,180 against Italy. Thus, a total of 61,711 or 77.4 percent of all cases pending at the end of 2016 originated in just six of the forty-seven Member States. By comparison, the number of cases pending against other large Member States was much smaller: 403 against France; 213 against Germany; and 231 against the United Kingdom. See EUR. COURT OF HUMAN RIGHTS, COUNCIL OF EUR., ANNUAL REPORT 2016, 191-92 (2017), <http://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c=>.

II. HISTORY AND EVOLUTION OF THE EUROPEAN CONVENTION SYSTEM

“A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or to Dachau.”

– *Pierre-Henri Teitgen* 6

A. Background

The Council of Europe (“the Council”) is an intergovernmental organization established after World War II by ten European States in order to promote human rights, European unity, and social and economic progress.⁷ Membership in the Council of Europe has since risen to forty-seven countries and today encompasses the entire continent with the sole exceptions of Belarus and Kosovo. On November 4, 1950, the members of the Council signed the European Convention on Human Rights and Fundamental Freedoms (“the ECHR”, or “the Convention”) to further their mission. The Convention came into force three years later and has since developed into the present-day European Bill of Rights.⁸ The Convention’s primary intent is to protect civil and political rights, which limits it *ratione materiae*, as opposed to

6. Pierre-Henri Teitgen, Address to the Consultative Assembly of the Council of Europe (Sept. 1949) (attempting to sway the Assembly in favor of constructing a supranational system of human rights protections). Teitgen was an influential member of the French resistance during World War II and subsequently served in the French Parliament as Minister of Information, Minister of Justice, Minister of Defense, and Deputy Prime Minister. During his time as Minister of Justice, he oversaw the trials of French politicians who had collaborated with the Nazi Regime. He was not only one of the “Founding Fathers” of the European Convention system but also played an instrumental role in the creation of the European Community, the predecessor to the European Union.

7. Some say that the person most responsible for the creation of the Council of Europe was Joseph Stalin. The post-war fear that spread across Western Europe is arguably what led to the creation of the Convention, as leaders sought to prevent the rise of yet another totalitarian regime. Maybe one day we will similarly look back at Donald Trump as the trigger that finally induced the United States to ratify the Inter-American Convention on Human Rights?

8. The Convention was signed in Rome, Italy, on November 4, 1950. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953) [hereinafter ECHR].

protecting economic, social, or cultural rights.⁹ Its acceptance and almost instant success was a feat primarily achieved by the Convention's founding fathers: Sir David Maxwell-Fyfe¹⁰ and Pierre-Henri Teitgen.

The European Convention initially established a two-part enforcement system consisting of the (part-time) European Commission of Human Rights and the (part-time) European Court of Human Rights ('the Court', 'the Strasbourg Court', or the ECtHR).¹¹ Prior to Protocol 9, individuals were not entitled to bring their cases directly before the Court.¹² Instead, the individual only had a right to file an application with the Commission. The Commission then acted as a filter by deciding the admissibility of complaints and determining which cases were worthy of reference to the Court.¹³

9. See PHILIP LEACH, *TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS* 5 (2d ed. 2001); JEAN-PAUL COSTA, *EUR. COURT OF HUMAN RIGHTS, COUNCIL OF EUR., TEN YEARS OF THE "NEW" EUROPEAN COURT OF HUMAN RIGHTS* 11 (2009), http://www.echr.coe.int/Documents/10years_NC_1998_2008_ENG.pdf.

10. Sir David was a British MP and had served as a prosecutor at the Nuremberg trials. This had persuaded him of the importance of international oversight of national protection of human rights and fundamental freedoms.

11. The European Commission of Human Rights was established in 1954. Five years later, the European Court of Human Rights was created in 1959. See *EUR. CT. HUM. RTS, THE COURT IN BRIEF*, available at: http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Apr. 16, 2017). Pierre-Henri Teitgen wanted a special court to "raise the alarm" for Europe upon the threat of totalitarianism.

12. Originally, the question whether an individual should have the right to directly petition the Court was only touched upon by a few members of the drafting "Committee on Legal and Administrative Questions" of the Council of Europe. The idea of such an entitlement continued to develop and was met with resistance. The committee worried of "abuses and dangers," as evident in the statement that only Member States should have the right "to bring another Member State before an international tribunal for the violation of any one of the recognised fundamental freedoms. This solution would . . . obviate the abuses and dangers which might arise from proceedings instituted by private individuals." Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly (May 11 – Sept. 8, 1949) – The Hague: Martinus Nijhoff, 1975 [hereinafter *Travaux Préparatoires*, Vol. I]. Ultimately, the Committee agreed "[t]hat any person after exhaustion of national remedies should be allowed to present his claim before a Committee which will examine the complaint, hearing any legal representative." See *id.* at 162. Protocol 9 is discussed in note 39 and accompanying text.

13. The Commission was eliminated in 1998, after the entry into force of Protocol 11. See Rudolf Bernhardt, *Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11* 1 AM. J. INT'L L. 145 (1995).

Early on, the Strasbourg system seemed weak and incapable of prolonged success, predominantly due to its optional clauses and world powers such as France, Italy, and the United Kingdom refraining from accepting compulsory jurisdiction of the Court or the individual's right to petition.¹⁴ Furthermore, the Court and Commission treaded carefully so as not to infringe upon, in actuality or in spirit, the sovereignty of the Contracting Parties. As a consequence, the Court handed down only twenty judgments in the period from 1959 to 1975.¹⁵

In the 1980s, a new geopolitical atmosphere of human rights promotion and steady growth in the number of Contracting Parties led the Commission to refer more and more cases to the Court, which in turn made it increasingly difficult to manage the case load and keep the length of proceedings in check. The surge of cases burdened the part-time Court so heavily that the average duration of proceedings skyrocketed to somewhere between five and six years. As a consequence, the future of the entire Strasbourg system seemed dim unless a remedial overall were to occur.¹⁶ In 1994, out of the disorder, emerged Protocol 11, which comprehensively restructured the control machinery of the Convention. The European Commission of Human Rights as a filter mechanism was abolished and individuals were granted direct access to the Court, which became a full-time court. The condition of prior unsuccessful exhaustion of domestic remedies remained. Importantly for the Contracting Parties, acceptance of the

14. See Astrid Kjeldgaard-Pedersen, *The Evolution of the Right of Individuals to Seize the European Court of Human Rights*, 12 J. HIST. INT'L L. 267 (2010).

15. See *id.* The reluctance of the Contracting States to accept individual complaints is also illustrated by the fact that only Germany was willing to do so from the start. The United Kingdom followed in 1966 and France only in 1981. See also Christian Walter, *History and Development of European Fundamental Rights and Fundamental Freedoms*, in EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS 1, 5 (Dirk Ehlers ed. 2007).

16. The number of applications rose from 404 in 1981 to 4,750 in 1997. See Donald W. Jackson, *Increasing Caseload and Protocol 11 Reforms*, in DAVID P. FORSYTHE, ENCYCLOPEDIA OF HUMAN RIGHTS 175 (Vol. I, 2009). For further analysis see also MIKAEL RASK MADSEN, FROM COLD WAR INSTRUMENT TO SUPREME EUROPEAN COURT: THE EUROPEAN COURT OF HUMAN RIGHTS AT THE CROSSROADS OF INTERNATIONAL AND NATIONAL LAW AND POLITICS, LAW & SOCIAL INQUIRY (2007), Vol. 32, No. 1, pp. 137-159.

jurisdiction of the Court became compulsory.¹⁷ Unsurprisingly, this restructuring did not miraculously resolve the issue of the Court's tremendous caseload, but nonetheless helped it to remain intact despite the number of applications increasing every year.¹⁸

B. Widening of the Convention via Geographic Expansion

There are currently forty-seven Contracting Parties that make up the Council of Europe – a number that continues to grow.¹⁹ About 820 million citizens of these forty-seven states are protected by the Strasbourg system. Non-citizens are also protected by the ECHR if they are refugees, temporary residents, or otherwise come under the jurisdiction of a Contracting Party. This explains, in part, why the Court is so overburdened today. However, as stated above, of the forty-seven Contracting Parties, five or six countries produce between two-thirds and three-quarters of all complaints brought to the Court every year. Otherwise, the Court would be able to handle the caseload quite easily.

Initially, there were twelve Contracting Parties to the Convention, which by and large shared the same post-World War II history, had functioning democracies, and had respect for the rule of law.²⁰ The number of Contracting Parties did not increase significantly until the fall of the Soviet Union. The end of the cold war, however, led to a rush of accessions by the Central and Eastern European Countries (CEECs)

17. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, E.T.S. No. 155 (entered into force Nov. 1, 1998).

18. For further analysis see Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN STATE INT'L L.REV. 101-14 (2002).

19. A comprehensive list of member states is available. See *Chart of Signatures and Ratifications of Treaty 005*, Council of Eur., <http://www.coe.int/en/web/about-us/our-member-states> (last visited Apr. 16, 2017).

20. The original Contracting States were Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Turkey, and the United Kingdom. See generally Frank Emmert & Siniša Petrović, *The Past, Present, and Future of EU Enlargement*, 37 FORDHAM INT'L L.J. 1349 (2014).

seeking to integrate with the rest of Europe.²¹ Since 1990, twenty-one countries that were formerly part of the Soviet Union or controlled by it have joined the Council of Europe.²²

The accession of the CEECs posed a unique and significant challenge for the ECtHR not only due to the rapidly increasing number of cases brought to it, but also because of an inevitable ideological shift. The largely like-minded group of Western European countries, which all had a particular aim when establishing the Strasbourg system, now had to accommodate former Soviet countries and, like all Contracting Parties, they have the right to send judges to the Strasbourg Court. The greater adjustments, however, were imposed on the CEECs. In order to comply with the Convention it was not only necessary to comprehensively revise domestic laws. Paper is patient after all but human rights and fundamental freedoms have to be respected in practice and not in theory alone. The biggest challenge, it turned out, was the comprehensive reform of the justice systems, from legal education all the way to the methods and policies of the highest courts.²³

In 1996, yet another former Communist country joined the Council. Russia applied for accession in 1992, had it granted four years later, and has since wavered on the edge of expulsion and withdrawal.²⁴ The

21. Poland, Czech Republic, Hungary, Romania, Bulgaria, the former Yugoslav Republic of Macedonia, Slovakia, Slovenia, Ukraine, Romania, Lithuania, Latvia, Estonia, Croatia, Bulgaria, and Albania. *See* Emmert & Petrović, *supra* note 20.

22. The Western member states' rationale for promoting the early accession of former CEECs, as opposed to strict adherence to the requirements of membership and consequential alienation, can be attributed to the prevalent idea that human rights, democracy, and European identity would propagate in an inclusive Council of Europe. As we can say in hindsight, this worked quite well in some but certainly not in all of the new Member States. *See* Emmert & Petrović, *supra* note 20.

23. *See*, Frank Emmert, *Rule of Law in Central and Eastern Europe*, 32 *FORDHAM INT'L L.J.* 551 (2009); Zdenek Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 *AM. J. COMP. L.* 531 (2004); *EAST EUROPEAN FACES OF LAW AND SOCIETY: VALUES AND PRACTICES* (William B. Simons ed. 2014); *see also*, Frank Emmert & Siniša Petrović, *The Past, Present, and Future of EU Enlargement*, 37 *FORDHAM INT'L L.J.* 1349 (2014); *EUROPEAN JUDICIAL SYSTEMS AS A CHALLENGE FOR DEMOCRACY 2017* (Elzbieta Kuzelewska et al. eds., 2015) (regarding the Expansion of the European Union).

24. Russia sought to join the Council of Europe for multiple reasons, including to strengthen trade ties with Europe and overall relations with the European Union and CEECs.

acceptance of Russia aroused criticism from those who believed the Council was exceeding its geographical scope. More importantly, the critics feared the continuous expansion of the Council into the former Communist world, with a rather lax interpretation of the criteria for admission, undermined the system's "moral authority."²⁵ Conceivably, the following quote by a rapporteur, proceeding Russia's accession, somewhat confirms the critic's reservations as merited: "Russia does not yet meet all Council of Europe standards. But integration is better than isolation; cooperation is better than confrontation."²⁶ To ensure

See Pamela A. Jordan, *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms*, 11 J. DEMIKRATIZATSIYA 281 (2003) for details as to Russia's accession experience. Regarding (some) of the problems with Russia's compliance, see, e.g., Bill Bowring, *The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR*, 2 GOETTINGEN J. INT'L L. 589 (2010); Julia Lapitskaya, *ECHR, Russia, and Chechnya: Two is Not Company and Three Is Definitely a Crowd*, 43 NYU J. INT'L L. & POL. 479 (2010).

25. Walter Schwimmer, *Timid Moral Policeman*, ECONOMIST, Nov. 25, 1999, at 56, <http://www.economist.com/node/326818> (last visited Apr. 16, 2017).

26. Eur. Consult. Ass., *Russia's Request for Membership of the Council of Europe*, Doc. No. 7443 (Jan. 2, 1996). The accession procedure had been suspended in 1995 after Russian armed forces intervened in Chechnya to crush the independence movement there. However, the negotiations resumed soon enough and, after the endorsement by the Political Affairs Committee under Mühlemann and several other experts, the Parliamentary Assembly voted by a two-thirds majority to admit the Russian Federation. This was done in spite of more than cautious remarks by the Committee on Legal Affairs and Human Rights:

The Committee . . . thinks the only conclusion that can be drawn from the above considerations is that, for the time being, considerable deficits remain in the application of laws and regulations and the observance of human rights. In this respect, the Russian Federation cannot be regarded as a State based on the rule of law. Neither is the full observance of human rights guaranteed - the documented human rights abuses in Chechnya are the best example, but violations of human rights are not restricted to that Republic. While the freedom of expression and the freedom of association are relatively well-protected, the freedom of movement is restricted and basic rights of those suspected accused of and/or detained for criminal or administrative offences are painfully missing. Progress towards the rule of law and the observance of human rights has been made in the last few years, but it is often frustratingly slow, and sometimes even goes into reverse (as the events in Chechnya and the powers of the Federal security services demonstrate).

From a legal affairs and human rights point of view, applying strict criteria, the Committee must thus conclude that the Russian Federation does not yet fulfil the conditions of membership as laid down in Article 3 and 4 of the Statute of the Council of Europe. Having come to this conclusion the Committee on Legal Affairs and Human Rights has fulfilled the instructions of the Assembly. The question could,

Russia's compliance with the Council's objectives, specific membership criteria containing twelve agreements and twenty-five commitments were produced.²⁷ Subsequent events have shown that this was not really successful.²⁸

Perhaps the most profound accession attempt yet is one that has been discussed for decades – the accession of the European Union to the Convention. The European Union was set to become the forty-eighth Contracting Party to the Convention. Although all EU Member States are already members of the Council of Europe and Contracting Parties to the European Convention, accession of the EU itself would permit individuals to apply to the Court in Strasbourg for review of acts

however, be asked whether the accession of the Russian Federation might in itself help to create conditions in conformity with Council of Europe standards, on the one hand through the commitments to be entered into by Russia upon accession and the subsequent monitoring procedure, and on the other hand, as a result of the mandatory judgments of the European Court of Human Rights. This consideration and other political arguments might speak in favour of Russia's accession to the Council of Europe at this point in time. Thus the final decision would depend on whether a critical assessment of the current legal and human rights situation or a political evaluation of the chances and perspectives for improvement of this situation following the admission should prevail.

Eur. Consult. Ass., *Russia's Application for Membership in the Council of Eur.*, Doc. No. 7463 (Jan. 18 1996), <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7397&lang=EN>. See also Mark Janis, *Russia and the 'Legality' of Strasbourg Law*, 1 EJIL 93-99 (1997).

The reports illustrate nicely the conundrum between allowing for early accession in the hope that membership will have a positive effect on human rights and rule of law versus denying early accession and using leverage to insist upon better performance with regard to human rights and rule of law at the risk of alienation.

27. The criteria included things such as “agreement to bring to justice human rights violators in Chechnya; agreement to improve conditions of criminal detention,” etc. See Parl. Ass., Council of Eur., *Application By Russia For Membership Of The Council Of Europe*, OPINION NO. 193 (1996), <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=13932&lang=EN>.

28. For a differentiated analysis see, for example, Anatoly I. Kovler, *Russia: European Convention on Human Rights in Russia: Fifteen years after*, in *THE IMPACT OF THE ECHR ON DEMOCRATIC CHANGE IN CENTRAL AND EASTERN EUROPE – JUDICIAL PERSPECTIVES* 351-72 (Iulia Motoc & Ineta Ziemele eds., 2016). For the argument that the large number of cases from Russia may be caused by the fact that Russian judges are particularly ECtHR friendly, in particular since they do not see enough movement toward rule of law and protection of human rights otherwise, see Alexei Trochev, *All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia*, 17 DEMOKRATIZATSIYA 145-78, (2009).

of EU institutions as well.²⁹ The legal basis for such a groundbreaking move can nowadays be found in Article 59(2) ECHR, as amended by Protocol No. 14, which states, “the European Union may accede to this Convention.”³⁰ However, the European Union Court of Justice (‘the ECJ’) gave a negative opinion on the draft accession agreement out of concern that accession would upset the balance of the EU and affect the autonomy and effectiveness of the preliminary ruling procedure.³¹ This will be expanded below. In spite of the ECJ’s opinion, both the 2016 and 2017 Work Programmes of the CoE announced the continuing pursuit of EU accession.

C. Evolution of the Convention via Protocols

The Convention has been amended numerous times since its inception in 1950. These amendments came in the form of protocols added to the Convention. Some protocols have generated important updates of the Convention by adding fundamental rights and freedoms not previously contemplated by its founders. Other protocols have focused on changes to the mechanical structure of the Strasbourg system. Finally, some have dealt with the relationship between the Strasbourg system and national systems of human rights protection by introducing or amending the concepts of subsidiarity and the margin of appreciation.³² In sum, it can be said that the origin of each protocol chiefly stemmed from efforts to make the Strasbourg system more

29. EU institutions interact with millions of individuals. As the law currently stands, EU institutions are not directly bound by the ECHR or the ECtHR’s decisions. The Lisbon Treaty, as of December 1, 2009, commits the Union to accede to the ECHR. “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.” However, the Lisbon Treaty also upgraded the European Charter of Fundamental Rights from a statement of intent to a binding agreement, arguably making accession to the ECHR at least less urgent, if not entirely redundant. Nevertheless, the idea of EU accession is furthered by the recent article in Protocol 14, discussed in section 3. *See infra* note 43.

30. ECHR, *supra* note 8, art. 59, note 2.

31. Draft International Agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties, Opinion 2/13, [2014] E.C.R. I-2454.

32. *See generally* Luzius Wildhaber, *The European Convention on Human Rights: The Past, The Present, The Future*, 22 AM. INT’L L. REV. 4 (2007).

efficient and resilient and to recognize the evolution of human rights at the regional and international level. Using protocols, rather than actual amendments of the Convention, provides a measure of flexibility, since most of them do not have to be ratified and applied by all Contracting Parties. An exception applies, however, to those protocols that change the institutional structure or working methods of the Strasbourg system. The following section aims to summarize each protocol's purpose, while also discussing the rationale for the most noteworthy changes.

1. 1950s to 1970s

The First Protocol to the Convention entered into force on May 18, 1954 and added fundamental rights to those already protected under the Convention, including the right to education, the right to free elections by secret ballot, and the right to peaceful enjoyment of one's property.³³ Protocol 2 gave the Court competence to issue advisory opinions pursuant to requests by the Committee of Ministers of the Council of Europe, and Protocols 3 and 5 modified Articles 22, 29, 30, and 34 of the Convention dealing with the Commission pre-screening procedure. Protocols 2, 3, and 5 were subsequently replaced by Protocol 11, which completely restructured the Strasbourg system and is discussed below. Finally, Protocol 4 added fundamental rights and freedoms not previously listed in the Convention, namely the prohibition of imprisonment for debt, the right to liberty of movement and the freedom to choose one's residence, the prohibition of expulsion of a State's own nationals, and the prohibition of collective expulsion of aliens.³⁴

33. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953). The First Protocol has been ratified by 45 of the 47 Contracting Parties, with Monaco and Switzerland abstaining so far.

34. Protocol 4 entered into force on May 2, 1968. *See* Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, Sept. 16, 1963, ETS No. 46. Protocol No. 4 has been ratified by 43 of the 47 Contracting Parties, with Greece, Switzerland, Turkey, and the United Kingdom abstaining so far.

2. 1980s to 1990s

As mentioned previously, changing sentiments in human rights law have motivated changes at both the national and regional level in Europe. A good example is Protocol 6, which entered into force on March 1, 1985 and abolished the death penalty during peacetime.³⁵ This addition to the Convention mirrored sentiments and actions of most European States that had contemplated abolishing capital punishment for quite some time. Protocol 7 emerged three years later with the purpose of updating the scope of rights under the Convention to the scope of rights envisaged by the new International Covenant on Civil and Political Rights ('the ICCPR') adopted by the General Assembly of the United Nations. By adding procedural safeguards relating to expulsion of aliens (Article 1), a right of appeal in criminal matters (Article 2), a right to compensation for wrongful conviction (Article 3), a right not to be tried or punished twice (Article 4), and a right to equality between spouses (Article 5), the Council of Europe wanted to avoid conflicts between the Convention and the Covenant.³⁶

Protocol 11 entered into force in 1996 as an answer to an influx of applications from the new member states in Central and Eastern Europe, where the European Convention applied for the first time, as well as a growing number of complaints by individuals from the old Western member states, where the Convention was finally becoming more widely known and appreciated. In light of these problems and in consideration of the Council of Europe's expected further growth, Protocol 11 established a mechanical overhaul of the Strasbourg system and replaced Protocols 8, 9, and 10.³⁷ By merging the two-organ

35. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty was opened for signature on April 28, 1983. *See* ETS No. 114. Protocol No. 6 has been ratified by 46 of the 47 Contracting Parties, with only Russia abstaining so far.

36. Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, Nov. 22, 1984. Protocol No. 7 has been ratified by 44 of the 47 Contracting Parties, with Germany, the Netherlands, and the United Kingdom abstaining so far.

37. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms was signed on May 11, 1994 and entered into force on November 1, 1998, after ratification by all 47 Contracting Parties. *See* ETS No. 155. Since the protocol caused

system of the part-time European Commission and part-time Court of Human Rights, a single, full-time Court was created. This consolidation was done with the intent to “shorten the length of Strasbourg proceedings” and simultaneously to “maintain the authority and quality of the case-law in the future.”³⁸ Furthermore, Protocol 11 retained the important feature that originally emerged from Protocol 9, which allows individuals to directly petition the Court after unsuccessful exhaustion of domestic remedies.³⁹ Additionally, it kept the ability of the Court to issue advisory opinions when requested by the Committee of Ministers, as originally seen in Protocol 2.

3. 2000s to Present

In recent years, both procedural and fundamental rights were added to the Convention. Protocol 12 developed after concerns that the original non-discrimination provision was too limited, since discrimination was only prohibited in the enjoyment of one of the other rights guaranteed by the Convention.⁴⁰ To remedy this, Protocol 12 entered into force on April 1, 2005 and provides for a much wider, general prohibition of discrimination by any public authority.⁴¹

important changes to be made to the Convention itself, it required unanimous approval. *See also* Bernhardt, *supra* note 13, at 145-55.

38. Explanatory Report on Protocol No. 11 to the Protection of Human Rights and Fundamental Freedoms, Mar. 11, 1998, ETS No. 155 at 6.

39. The battle for giving individuals direct access to the Court was ongoing since the Court’s inception. Protocol 9 finally awarded such a right. The ideology for doing so is found in the Explanatory Report. *See* Explanatory Report on Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 6, 1990, ETS No. 140 at 3. It is stated that “. . . [t]he situation whereby the individual is granted rights but not given the possibility to exploit fully the control machinery provided for enforcing them, could today be regarded as inconsistent with the spirit of the Convention, not to mention compatibility with domestic-law procedures in State Parties.”

40. One of many voices criticizing the limits of Article 14 of the Convention is Oddný Mjöll Arnardóttir. *See* ODDNÝ MJÖLL ARNARDÓTTIR, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2003).

41. Protocol No. 12 was opened for signature on November 4, 2000, and entered into force on April 1, 2005. It has so far been ratified by twenty Contracting Parties. *See* Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, ETS No. 177.

Another bold move was Protocol 13, which took Protocol 6's abolishment of the death penalty further by abolishing capital punishment in all circumstances, including for crimes committed in times of war and imminent threat of war. The Protocol does not permit any derogation or reservation.⁴²

Eight years later, Protocol 14 entered into force with the aim of establishing new admissibility criteria (Article 12), empowering a single judge to declare an application inadmissible (Article 7), empowering the Committee of Ministers in circumstances where States fail to execute judicial decisions (Article 16), and changing the judicial term of office to a single, nine-year term (Art. 2). Most interestingly, Protocol 14 includes a short but powerful addition which states "The European Union may accede to this Convention" (Article 17).⁴³ As we know, actual accession by the European Union to the Convention has thus far not occurred.

Protocols 15 and 16, both of which have yet to enter into force, have the ability to alter the Court's relations with Contracting Parties.⁴⁴ Protocol 15 amends the Convention in order to add references to the principle of subsidiarity and the doctrine of the margin of appreciation to the preamble. It also reduces the time within which an applicant may

42. The increased protection found in Protocol 13 emerged in recognition of the right to life as "an inalienable attribute of human beings" worth the utmost respect. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, opened for signature on May 3, 2002, and entered into force on July 1, 2003. It has been ratified by 44 of the 47 Contracting Parties, with only Armenia, Azerbaijan, and Russia abstaining so far. See Protocol 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, ETS No. 187. Compliance will be tested if President Erdogan of Turkey follows through with his recent announcement that he wants to re-introduce the death penalty in his country.

43. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, opened for signature on May 13, 2004, entered into force on June 1, 2010, after ratification by all 47 Contracting Parties. See ETS No. 194. Article 17 of the Protocol added a new paragraph 2 to Article 59 of the Convention regarding the EU.

44. For further analysis see Noreen O'Meara, *Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR*, iCourts Working Paper Series, No. 31, (Sept. 1 2015), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654205.

file a case with the Court from the current six months to four months.⁴⁵ Protocol 16 permits the highest courts and tribunals of a State to request advisory opinions from the Court on interpretation questions related to the rights and freedoms in the Convention or Protocols.⁴⁶ Requests are entirely optional and the opinions issued by the Court following a request are non-binding.⁴⁷

As can be seen, the Protocols have added new fundamental rights and freedoms to the Convention that have to be respected by the Contracting Parties, and they will continue to do so as human rights standards progress. However, it is important to remember that most Protocols are only binding upon the States that ratify them.

D. Deepening of the Convention via Case Law

“The essence of human rights protection under the Convention is to be found in the principles of democracy and rule of law.”

– Jean-Paul Costa

The idea that a supranational institutional system for the protection and promotion of human rights could hold States liable was initially a radical concept. More significantly, the capability of an individual to challenge a State’s actions (or inactions) as violations of her human rights and fundamental freedoms in an international court was

45. Protocol No. 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature on June 24, 2013. It requires ratification by all Contracting Parties to enter into force. As of July 2017, it has been ratified by 35 of the 47 Contracting Parties. *See* ETS No. 213.

46. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature on October 2, 2013. It requires ten ratifications to enter into force. As of July 2017, it has been ratified by Albania, Armenia, Finland, Georgia, Lithuania, San Marino, and Slovenia. Eleven other Contracting Parties have signed and entry into force can be expected soon. However, the right to request advisory opinions will only be open for courts designated by the governments of Contracting Parties who have ratified the Protocol. *See* Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Oct. 2, 2013, ETS No. 214.

47. The Explanatory Report views advisory opinions as beneficial to both the Contracting Parties and the Court. We will return to this issue below. *See* Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 214.

unprecedented. It is this system that has led to some of the most important human rights decisions of our time, and has provided a regional conscience that protects over 820 million people, warranting its description as “the most effective human rights regime in the world.”⁴⁸

Rejecting the so-called “originalist” approach favored by jurists like the late Justice Antonin Scalia of the American Supreme Court, the ECtHR has continuously recognized the European Convention on Human Rights as “a living instrument which must be interpreted in the light of present-day conditions.”⁴⁹ This evolutive interpretation has allowed the Court on occasion to recognize new rights not explicitly found in the Convention.⁵⁰ In many other cases, the Court expanded rights that are explicitly mentioned but were originally interpreted more restrictively.⁵¹ Any attempt at outlining the entire body of rights

48. Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS, 3 (2008). The chapter is also available online in the Faculty Scholarship Series 89, available at: http://digitalcommons.law.yale.edu/fss_papers/89.

49. See *Tyrer v. United Kingdom*, No. 5856/72, Eur. Ct. H.R. (1978). See *Marckx v. Belgium*, No. 6833/74, Eur. Ct. H.R. (1979). See also *Loizidou v. Turkey*, No. 15318/89, Eur. Ct. H.R. (1996). There, the Court held even more specifically:

[t]hat the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court’s case-law Such an approach, in the Court’s view, is not confined to the substantive provisions of the Convention, but also applies to those provisions, such as Articles 25 and 46 (art. 25, art. 46), which govern the operation of the Convention’s enforcement machinery. *It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.*

See Application No. 15318/89, Eur. Ct. H.R. (1995). For further analysis, see George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy* (Mar. 14, 2012), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836.

50. See Jean-Paul Costa, *The European Court of Human Rights and its Recent Case Law*, 38 TEXAS INT’L L.J. 455, 458 (2003). After authoring this article, Jean-Paul Costa would later become the President of the European Court of Human Rights. Costa’s interpretive philosophy is similar to that of Justice Douglas of the United States’ Supreme Court in the opinion *Griswold v. Connecticut*, 381 U.S. 479 (1965), where Douglas held that the Right to Privacy comes from penumbras that emanate from the guarantees found in the Bill of Rights.

51. For a critical analysis of the ECtHR’s “consensus methodology”, i.e. the Court’s expansion of rights once “a certain measure of uniformity” has evolved among the Contracting States with regard to “the existence of rights-enhancing practices and policies” see Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133, 133-165 (1993).

and freedoms currently protected under the Convention and its Protocols, therefore, requires space and time not available here.⁵² Any attempt at making predictions for the future is even more difficult since rights and freedoms continue to emerge based on the general spirit of the Convention with the passing of time, the evolution of societies, and the updates undertaken by the Contracting Parties.⁵³ Nevertheless, in the remainder of this section, some important and mostly recent decisions of the ECtHR shall be presented, as examples of the Court's approach.

52. Instead, the reader should refer to THE EUROPEAN CONVENTION ON HUMAN RIGHTS - A COMMENTARY (Christoph Grabenwarter ed., 2014); WILLIAM A. SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS - A COMMENTARY (2015); D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (3d ed., 2014); and/or BERNADETTE RAINEY, ELIZABETH WICKS & CLARE OVEY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (6th ed., 2014).

53. At the same time, not every right is considered inviolable. The Court has used the following three-part test: Is the inference (1) prescribed by law; (2) in furtherance of a legitimate aim; and (3) necessary in a democratic society? In determining whether the infringement in "necessary in a democratic society", the Court explained in a case concerning the control of inmate mail by prison authorities that:

(a) the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' [(see the Handyside judgment of 7 December 1976, Series A no. 24, at 22, § 48)]; (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention [(see *id.* at 23, § 49)]; (c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, inter alia, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued' [(see *id.* at 22-23, §§ 48-49)]; (d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted [(see the above-mentioned Klass and others judgment, Series A no. 28, at 21, § 42)].

See Application no. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, and 7136/75, Silver and others v. the United Kingdom, Judgment, (March 25, 1983). See also *infra*, notes 90 et seq. and accompanying text.

1. Article 1 Obligation to Respect Human Rights

Al-Skeini and Others v. United Kingdom (2011)⁵⁴

In July of 2011, the Court decided *Al-Skeini*, which has become the leading ECHR authority on extraterritorial application of the Convention.⁵⁵ The case concerns the extraterritorial application of the ECHR under Article 1, which states that the High Contracting parties “shall secure to everyone within their jurisdiction the rights and freedoms” found in the Convention. After six Iraqi civilians were killed at the hands of British troops on patrol in Bosra, Iraq, the UK government argued that the killings occurred outside the jurisdiction of the UK, and therefore the Convention’s obligation of an independent and thorough investigation of the matter did not apply.

Although the House of Lords agreed with the UK government’s position in *Al-Skeini*, the Court differed under the principle of territoriality. The Grand Chamber’s unanimous opinion, issued in favor of the six applicants, held that “whenever a State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention”⁵⁶ Holding Member States liable for their actions, even if committed in non-contracting States outside of the Convention’s territory, confirms principles established in *Soering* and more recent cases like *Paposhvili* (see below).

El-Masri v. The Former Yugoslav Republic of Macedonia (2012)⁵⁷

One year after the *Al-Skeini* decision, the Court in *El-Masri* held on December 13, 2012 that Member States could be liable for Convention breaches committed within their jurisdiction by another State, if the Member State was aware of the acts. In 2003, Macedonian officials

54. *Al-Skeini and Others v. United Kingdom*, No. 55721/07, Eur. Ct. H.R. (2011).

55. See generally Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT’L L., 121-39 (2012).

56. *Al-Skeini and Others v. United Kingdom*, *supra* note 54, at 136-37. Furthermore, the Court noted that solely because previous precedent said the Convention would apply when the army of one signatory occupied the territory of another signatory (*espace juridique*), this did not mean that occupation in a non-signatory’s territory could not trigger jurisdiction under the Convention. *Id.*

57. *El-Masri v. The Former Yugoslav Republic of Macedonia*, No. 39630/09, Eur. Ct. H.R. (2012).

detained German citizen Khaled el-Masri upon arrival at Skopje airport. He was then held for twenty-three days, during which time he was interrogated by Macedonian agents about potential Al-Qaeda connections and denied access to a lawyer or a consular agent of the German embassy. Although he was told that he would be returned to Germany, he was subsequently transferred to a special CIA rendition team. Macedonian officials stood by and watched as el-Masri was blindfolded, shackled, sodomized, and severely beaten by the CIA agents. He was then transferred to a CIA black site in Kabul, Afghanistan, where he was held without trial or access to a lawyer for four to five months.

The Court unanimously found a violation of Articles 3, 5, 8, and 13 of the Convention by Macedonia,⁵⁸ while simultaneously condemning the CIA's "tactics," as well as the United States judiciary, for failing to render justice to el-Masri or other victims of U.S. torture. The El-Masri precedent will hopefully deter Member States from assisting others in carrying out future human rights violations.

2. Article 3 Prohibition of Torture

*Ireland v. United Kingdom (1978)*⁵⁹

In one of the rare interstate cases, Ireland complained about the interrogation by UK police authorities of terrorism suspects in the conflict in Northern Ireland, specifically the application of the so-called "five techniques," namely:

- (a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position,' described by those who underwent it as being 'spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and

58. The Court held that Macedonia violated Article 3 for its failure to carry out an effective investigation into the applicant's allegations of ill-treatment and for the inhuman and degrading treatment to which the applicant was subjected while being held. The Court found a violation of Article 5 due to the arbitrary detention of the applicant and for the applicant's subsequent captivity in Afghanistan. The Court also found a violation of Articles 8 and 13. *See id.* at 80.

59. *Ireland v. United Kingdom*, No. 5310/71, Eur. Ct. H.R. (1978).

the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers'; (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.⁶⁰

The United Kingdom did not contest the findings of fact but argued that "the findings in question . . . do not give rise to problems of interpretation or application of the Convention sufficiently important to require a decision by the Court," not least because "the subject-matter of those findings now belongs to past history in view of the abandonment of the five techniques . . . , the solemn and unqualified undertaking not to reintroduce these techniques."⁶¹

The ECtHR, however, held that:

the responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contested allegations of violation of [Art. 3]. The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by [all] States of the engagements undertaken by them as Contracting Parties [Art. 19].⁶²

Therefore, the Court:

1. holds unanimously that, although certain violations of [Art. 3] were not contested, a ruling should nevertheless be given thereon;
2. holds unanimously that it has jurisdiction to take cognisance of the cases of alleged violation of [Art. 3] to the extent that the

60. *Id.* at ¶ 96.

61. *Id.* at ¶ 152.

62. *Id.* at ¶ 154.

applicant Government put them forward as establishing the existence of a practice;

3. holds by sixteen votes to one that the use of the five techniques in August and October 1971 constituted a practice of inhuman and degrading treatment, which practice was in breach of [Art. 3]. . .

⁶³

Soering v. United Kingdom (1989)⁶⁴

Jens Soering and Elizabeth Haysom were in a relationship opposed by the parents of the girl. To overcome the opposition and retain access to the parent's financial resources, the couple planned to murder them. During a visit to the parents, Soering picked a fight and killed both parents with a knife. The couple then fled to the United Kingdom where they were arrested. A grand jury in the Commonwealth of Virginia indicted Soering with the murder of the Haysoms and the United States requested extradition from the United Kingdom. While awaiting extradition, Soering filed a petition for review and claimed that he would be sentenced to death if extradited and that the "death row phenomenon" would subject him to inhuman and degrading treatment and punishment in violation of Article 3 ECHR.

Although the ECtHR acknowledged that Article 3 "should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction,"⁶⁵ the Court held that "the decision by a Contracting State to extradite a fugitive may give rise to an issue under [Art. 3], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or

63. In particular with regard to the discussion in the United States about waterboarding and other techniques of interrogation, the reader is reminded of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS 1465. Not only is the United States a party to this Convention, its provisions are widely considered to be part of *ius cogens*, i.e. peremptory norms of such importance that no derogation is ever permitted. See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 54-57 (2006).

64. Soering v. United Kingdom, No. 14038/88, Eur. Ct. H.R. (1989).

65. *Id.* at ¶¶ 83, 86.

punishment in the requesting country.”⁶⁶ The Court continued that Article 3 “. . . [could] not be interpreted as generally prohibiting the death penalty,”⁶⁷ and that “[t]he democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt.”⁶⁸ Nevertheless, the ECtHR decided that:

having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by [Art. 3]. . . . Accordingly, the Secretary of State’s decision to extradite the applicant to the United States would, if implemented, give rise to a breach of [Art. 3].⁶⁹

The Soering doctrine was later expanded and found a recent culmination in the case of *Paposhvili v. Belgium*.⁷⁰ The applicant was an asylum seeker from Georgia who had been arrested on several occasions for shoplifting. In 2000, after his asylum application was refused, the applicant lodged the first of several requests for leave to remain in Belgium on account of his health and family. By 2015, he was still fighting extradition. Inter alia, he claimed that he required very expensive treatment for his leukemia and hepatitis C that would not be available to him in Georgia. The Belgian Government argued that “although it was acknowledged in the Court’s case-law that the responsibility of a Contracting Party could be engaged under Article 3 on account of the expulsion of an alien and his exposure to a risk of a breach of his economic and social rights, it nevertheless had to be taken into consideration that, where the person concerned suffered from an illness, neither the returning State nor the receiving State could be held

66. *Id.* at ¶ 91.

67. *Id.* at ¶ 103.

68. *Id.* at ¶ 111.

69. *Id.*

70. *Paposhvili v. Belgium*, No. 41738/10, Eur. Ct. H.R. (2016).

directly responsible for the shortcomings of the health-care system and the repercussions on the health of the individual concerned.”⁷¹ In response, the ECtHR first recalled its judgment in the case of *N. v. United Kingdom*,⁷² pursuant to which the removal of an asylum seeker to her homeland Uganda where she was unlikely to receive the same quality of treatment for her AIDS infection did “not disclose very exceptional circumstances” and “would not give rise to a violation of Article 3 of the Convention.”⁷³ However, the Court then continued in *Paposhvili* as follows:

188. [...*W*]hat is in issue here is the negative obligation not to expose persons to a risk of ill-treatment proscribed by Article 3. It follows that the impact of removal on the person concerned must be assessed by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State.

189. As regards the factors to be taken into consideration, the authorities in the returning State *must verify on a case-by-case basis* whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant’s illness so as to prevent him or her being exposed to treatment contrary to Article 3 The benchmark is not the level of care existing in the returning State; it is not a question of ascertaining whether the care in the receiving State would be equivalent or inferior to that provided by the health-care system in the returning State. Nor is it possible to derive from Article 3 a right to receive specific treatment in the receiving State which is not available to the rest of the population.

190. The authorities must also consider the extent to which the individual in question *will actually have access* to this care and these facilities in the receiving State. The Court observes in that regard that it has previously questioned the accessibility of care . . . and referred to the need to consider the cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care

191. Where, after the relevant information has been examined, *serious doubts persist* regarding the impact of removal on the persons concerned – on account of the general situation in the receiving country and/or their individual situation – the returning

71. *Id.* at ¶ 150.

72. *N. v. United Kingdom*, No. 26565/05, Eur. Ct. H.R. (2008).

73. *Id.* at ¶ 51.

State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3⁷⁴

Since Belgium had not sufficiently assessed “the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia”⁷⁵ the Court found that there would have been a violation of Article 3 if the applicant had been forced to return to Georgia.

3. Article 8 Right to Respect for Private and Family Life

López Ostra v. Spain (1994)⁷⁶

The European Convention does not contain a right to environmental protection, let alone a right to a clean environment. Nevertheless, the ECtHR accepted the case of the López Ostra family who lived in Murcia (Spain) in the immediate vicinity of a plant for the treatment of liquid and solid waste emerging from leather tanning and built with government subsidies on municipal land. The Spanish courts had found no violation of the family’s right to physical integrity and the right to private life and inviolability of the home since the family could have moved and the impairment of the quality of life of the family by noxious fumes “was not serious enough to infringe the fundamental rights recognised in the [Spanish] Constitution.”⁷⁷ The ECtHR disagreed. Although the Spanish authorities were not directly responsible for the emissions, they had allowed the plant to be built on public land and subsidized the construction. When the emissions exceeded permitted levels, the local authorities had failed to take the necessary steps to bring the violations to an end and had resisted

74. *Paposhvili v. Belgium*, *supra* note 70, at ¶¶ 188-91 (emphasis added).

75. *Id.* at ¶ 205.

76. *López Ostra v. Spain*, No. 16789/90, Eur. Ct. H.R. (1994).

77. *Id.* at ¶ 50.

judicial decisions to that effect.⁷⁸ As a result, the State “did not succeed in striking a fair balance between the interests of the town’s economic well-being – that of having a waste treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her private and family life” as protected by Article 8 of the Convention.⁷⁹ The notion that pollution of the immediate environment can cause a violation of everyone’s “right to respect for his private and family life, [and] his home . . .” has since been confirmed on multiple occasions.⁸⁰

In other cases, the ECtHR used Article 8 to mandate a right to divorce or at least judicial separation,⁸¹ expand the protection of “illegitimate”⁸² and adopted children,⁸³ non-custodial parents,⁸⁴ unmarried

78. *See id.* at ¶ 56.

79. *See id.* at ¶ 58.

80. *See, e.g.*, *Guerra and Others v. Italy*, Application No. 116/1996/735/932, Judgment of 19 February 1998; *Taşkin and Others v. Turkey*, Application No. 46117/99, Judgment of 10 November 2004; *Fadeyeva v. Russia*, Application No. 55732/00, Judgment of 9 June 2005; *Giacomelli v. Italy*, Application No. 59909/00, Judgment of 2 November 2006; *Tătar v. Romania*, Application No. 67021/01, Judgment of 27 January 2009; and more recently *Dzemyuk v. Ukraine*, Application No. 42488/02, Judgment of 4 September 2014. Instructive also the forceful joint dissent by Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton v. United Kingdom*, Application No. 36022/97, Judgment of 8 July 2003 (concerning noise emissions near Heathrow Airport).

81. *See Airey v. Ireland*, No. 6289/73, Eur. Ct. H.R. (1979), at ¶ 33.

82. The leading case is *Marckx v. Belgium*, No. 6833/74, Eur. Ct. H.R. (1979). It established the principle that parents of children born out of wedlock cannot be treated differently under the law compared to married couples with children. *See id.* at ¶ 31.

83. One of several landmark decisions of the ECtHR held that the best interest of the child may override the rights of the parents in certain circumstances and that the wishes of the child have to be taken into account in adoption cases. The Court formulated the principle that “adoption means providing a child with a family, not a family with a child”. *See Pini and Others v. Romania*, No. 78028/01 ¶¶ 149-66 and No. 78030/01, Eur. Ct. H.R. (2004), in particular at ¶ 156 (referencing to the decision in *Fretté v. France*, No. 36515/97, Eur. Ct. H.R. (2002)). For comprehensive analysis see COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN LAW RELATING TO THE RIGHTS OF THE CHILD (2015), http://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF.

84. *See, e.g.*, *Anayo v. Germany*, No. 20578/07, Eur. Ct. H.R. (2010) at ¶¶ 59-62; *Schneider v. Germany*, No. 17080/07, Eur. Ct. H.R. (2011) at ¶ 88.

heterosexual couples,⁸⁵ same-sex partners,⁸⁶ transgender persons,⁸⁷ and refugees or asylum seekers claiming a right to family reunion.⁸⁸ Unsurprisingly, not all of these decisions have been universally welcomed in the Contracting Parties.⁸⁹

4. Articles 9, 10, 11 ECHR and Article 3 of Protocol No. 1 – Political Activities, Interferences “Necessary in a Democratic Society” and Meeting a “Pressing Social Need”

Refah Partisi v. Turkey (2003)⁹⁰

Article 9 protects the freedom of thought, conscience and religion. Article 10 guarantees the freedom of expression, including the freedom to hold opinions and to receive and share information and ideas without interference by the authorities. Article 11 secures the freedom of peaceful assembly and the freedom of association. Article 3 of the First Protocol mandates free elections by secret ballot. Refah Partisi or “the Welfare Party” was founded in Turkey in 1983 and took part in elections at various levels in Turkey from 1989. As of 1991, it was represented in the Turkish Parliament and its MPs took part in the work of parliamentary committees. In the 1995 elections, Refah won more seats than any other party and on June 28, 1996, it became part of a coalition government. The rise of the party in Turkish politics seemed unstoppable. However, on May 21, 1997, an application was filed with

85. In *K. and T. v. Finland*, the Court held that “that the existence or non-existence of ‘family life’ is essentially a question of fact depending upon the real existence in practice of close personal ties.” See *K and T v. Finland*, No. 25702/94, Eur. Ct. H.R. (2001).

86. See *Vallianatos and Others v. Greece*, No. 29381/09 and 32684/09, Eur. Ct. H.R. (2013).

87. See *B. v. France*, No. 13343/87, Eur. Ct. H.R. (1992) (finding a violation of Art. 8 due to non-recognition a person’s true sexual identity).

88. See, e.g., *Abdulaziz, Cabales and Balkandali v. UK*, No. 9214/80, 9473/81, and 9474/81, Eur. Ct. H.R. (1985); *Berrehab v. Netherlands*, No. 10730/84, Eur. Ct. H.R. (1988).

89. See, e.g., CARMEN DRAGHICI, *THE LEGITIMACY OF FAMILY RIGHTS IN STRASBOURG CASE LAW – ‘LIVING INSTRUMENT’ OR EXTINGUISHED SOVEREIGNTY?* (2017).

90. *Refah Partisi v. Turkey*, No. 41340/98, 41342/98, 41343/98, and 41344/98, Eur. Ct. H.R. (2003). For background information and analysis see MICHAEL D. GOLDBABER, *A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 88-97* (2007).

the Turkish Constitutional Court to have Refah dissolved because it promoted Islamic fundamentalism in contradiction to the constitutional principle of secularism. In its defense before the Constitutional Court, Refah invoked the ECHR and claimed that its dissolution “was not prompted by a pressing social need and was not necessary in a democratic society.”⁹¹ This was a reference to the ECtHR judgment of January 30, 1998 in the case of *United Communist Party of Turkey and Others v. Turkey (1998)*.⁹² The TBKP was specifically representing the interests of the Kurdish people in Turkey and was dissolved immediately after being formed. This was found to be a violation of Article 11 since Turkey could not show that the TBKP had sought anything other than “a peaceful, democratic and fair solution of the Kurdish problem, so that the Kurdish and Turkish peoples may live together of their free will within the borders of the Turkish Republic, on the basis of equal rights and with a view to democratic restructuring founded on their common interests.”⁹³ In particular, the TBKP had never advocated violence or an overthrow of the political and constitutional system of Turkey.

With regard to Refah, however, the ECtHR was presented with a large number of speeches and statements made by members of the party, which regularly referred to the legitimacy of using force on the road toward establishment of an Islamic theocracy. In contrast to its decision regarding the TBKP, therefore, the Court concluded with regard to:

the question whether there was a pressing social need for the interference . . . in the present case, the Court finds that the acts and speeches of Refah’s members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah’s long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it

91. *Id.* at ¶ 14.

92. *United Communist Party of Turkey and Others v. Turkey*, No. 19392/92, Eur. Ct. H.R. (1998).

93. *See Partisi*, *supra* note 90, at ¶ 56.

envisaged in place. In view of the fact that these plans were *incompatible with the concept of a 'democratic society'* and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a 'pressing social need.'⁹⁴

5. The Margin of Appreciation

Handyside v. United Kingdom (1976)⁹⁵

The applicant, Richard Handyside, published *The Little Red Schoolbook* on sex education for children of twelve years and older in the United Kingdom in 1971. It was reviewed with mixed results in the press and after complaints were received, a warrant was issued under Section 3 of the Obscene Publications Act 1959/64, the premises of Mr. Handyside's publishing house were searched, and some 1,000 copies of the book were seized. After unsuccessful domestic remedies were exhausted, the applicant brought the case to Strasbourg and claimed a violation of Article 9 (freedom of thought, conscience and belief), Article 10 (freedom of expression), as well as Article 1 of Protocol No. 1 (peaceful enjoyment of one's possessions).

The ECtHR ruled:

48. . . . [t]hat the machinery of protection established by the Convention is *subsidiary* to the national systems safeguarding human rights The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted [Art. 35(1)]. These observations apply, notably, to [Art. 10(2)]. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and

94. *Id.* at ¶ 132 (emphasis added).

95. *Handyside v. United Kingdom*, No. 5493/72, Eur. Ct. H.R. (1976).

far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, *State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.* . . . Consequently, [Art. 10(2)] leaves to the Contracting States a *margin of appreciation*. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force

49. Nevertheless, [Art. 10(2)] does *not* give the Contracting States *an unlimited power of appreciation*. The Court, which . . . is responsible for ensuring the observance of those States' engagements (Article 19) . . . is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by [Art. 10]. The domestic margin of appreciation thus goes hand in hand with a *European supervision*. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.⁹⁶

Although the book was freely available in certain other countries, the Court in the end followed the majority of the Commission of Human Rights and found no violation of Article 10 ECHR or Article 1 of the First Protocol by the United Kingdom. A minority of the Commission and one dissenting judge found the measures of the United Kingdom to be disproportionate.

Handyside illustrates how the ECtHR uses the margin of appreciation to allow for differences in human rights protection between different Contracting Parties, albeit within limits and under the supervision of the Strasbourg organs. This approach has received both praise and criticism in the literature.⁹⁷

96. *See id.* at ¶¶ 48-49 (emphasis added).

97. Lord Hoffmann complains that:

[t]he Strasbourg court has to a limited extent recognised the fact that while human rights are universal at the level of abstraction, they are national at the level of application. It has done so by the doctrine of the 'margin of appreciation', an unfortunate Gallicism by which Member States are allowed a certain

latitude to differ in their application of the same abstract right. Clearly, that is a step in the right direction. But there is no consistency in the application of this doctrine and [...] I do not think that there is a proper understanding of the principle upon which it should be based. In practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.

See Lord Hoffman, Judicial Studies Board Annual Lecture: The Universality of Human Rights, (Mar. 19, 2009), <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bijj/BIIJ2013/hoffmann.pdf>. See also YUTAKA ARAI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2001); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 NYU J. INT'L L. & POL. 843 (1998); Marc Bossuyt, *Rechterlijk Activisme in Straatsburg*, RECHTSKUNDIG WEEKBLAD 723-33 (2014); Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?*, 3 UCL HUM. RTS. REV. 1 (2010); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW – DEFERENCE AND PROPORTIONALITY (2012); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEG. STUD. 705, 705-32 (2006); Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 MODERN L. REV. 671, 671-96 (1999); Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381, 381-418 (2012). Specifically for the view that the doctrine is giving too much leeway, see Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, COLUM. J. EUR. L. 113, 113-50 (2005); Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 625-49 (2001); Loukis G. Loucaides, *Reflections of a Former European Court of Human Rights Judge on his Experiences as a Judge*, ROMA RIGHTS (2010), available at: <http://www.errc.org/article/roma-rights-1-2010-implementation-of-judgments/3613/8>; James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT'L & COMP. L. Q. 459, 459-74 (2005). See also Thomas Willoughby Stone, Note, *Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in Fretté v. France to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation*, 3 CONN. PUB. INT. L.J. 271 (2003/04) (the Note justly criticizes the Court for caving into political pressure with regard to unproven risks associated with adoption by homosexual individuals or same-sex couples); E.B. v. France, No. 43546/02, Eur. Ct. H.R. (2008); see also Jan Kratochvil, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. OF HUM. RTS., 324, 324-57 (2011) (taking a differentiated approach, accepting the need for a margin of appreciation while being critical of its use in some instances. He suggests criteria for predictable and consistent use).

6. The Pilot Judgment Procedure

Broniowski v. Poland (2005)⁹⁸

During WWII, the eastern provinces of Poland were invaded by the Soviet Union and later became part of Belarus, Ukraine and Lithuania. In 1944, Poland entered into agreements with the former Soviet Republics of Ukraine, Belarus and Lithuania, recognizing the present-day borders and undertaking “to compensate persons who were ‘repatriated’ from the ‘territories beyond the Bug River’ and had to abandon their property there.”⁹⁹ It was estimated that about 1.25 million people were “repatriated” from these territories and that the vast majority of them had been compensated for their loss of property. However, by the time Poland became a member of the Council of Europe (November 26, 1991), the ECHR entered into force for Poland (January 19, 1993), and the First Protocol entered into force for Poland (October 10, 1994), some 78,000 individuals or families had not been fully or adequately compensated. Many of them, including the Broniowski family, were still pursuing their right to compensation in the Polish courts and some took their cases as far as the ECtHR in Strasbourg. In January 2004, a law entered into force in Poland pursuant to which individuals who had received at least partial compensation could no longer bring any claims and that any remaining claims would be capped at 50,000 PLN (about US\$12 thousand in 2017). The Broniowski family was among the excluded parties because they had received about two percent of the estimated value of the property formerly owned by them in the respective territories.

The ECtHR first made an important decision about the temporal application of the Convention: from the entry into force of the ECHR and any of its protocols for a particular State, the Court has jurisdiction *ratione temporis* over all acts and omissions of that State.¹⁰⁰ It continued as follows:

124. While the historical background of the case, including the post-war delimitations of State borders, the resultant migration of persons affected by those events and the Republican Agreements,

98. Broniowski v. Poland, No. 31443/96, Eur. Ct. H.R. (2005).

99. *Id.* at ¶ 11.

100. *See id.* at ¶¶ 122-23.

in which the applicant's entitlement to compensation originated . . . is certainly important for the understanding of the complex legal and factual situation obtaining today, the Court will not consider any legal, moral, social, financial or other obligations of the Polish State arising from the fact that owners of property beyond the Bug River were dispossessed and forced to migrate by the Soviet Union after the Second World War. In particular, it will not deal with the issue whether Poland's obligation under the Republican Agreements [of 1944] to return to those persons the value of the property abandoned in the former Soviet republics might have any bearing on the scope of the applicant's right under domestic legislation and under the Convention and whether Poland honoured the obligations it had taken upon itself by virtue of those Agreements.

125. The sole issue before the Court is whether Article 1 of Protocol No. 1 was violated by reason of the Polish State's acts and omissions in relation to the implementation of the applicant's entitlement to compensatory property, which was *vested* in him by *Polish legislation [after] the date of the Protocol's entry into force and which subsisted on 12 March 1996, the date on which he lodged his application with the Commission.*¹⁰¹

Having established the applicability of the Convention to the law of 2004, pursuant to which many claims were either rejected or capped, the Court acknowledged that the complexity of the matter and the "significant economic impact for the country as a whole" justify "a wide margin of appreciation" and "stringent limitations on compensation for the Bug River claimants."¹⁰² Nevertheless, "the Polish State has not been able to adduce satisfactory grounds justifying, in terms of Article 1 of Protocol No. 1, the extent to which it has continuously failed over many years to implement an entitlement conferred on the applicant, as on thousands of other Bug River claimants, by Polish legislation."¹⁰³

Finally, in an effort of preventing thousands of claims from being brought to the Strasbourg organs, the Court demanded that Poland should adopt a new compensation scheme for *all* remaining individuals and families:

193. The Court has already noted that the violation which it has found in the present case has as its cause a situation concerning

101. *Id.* at ¶¶ 124-25 (emphasis added).

102. *Id.* at ¶¶ 182-83.

103. *Id.* at ¶ 183.

large numbers of people. The failure to implement in a manner compatible with Article 1 of Protocol No. 1 the chosen mechanism for settling the Bug River claims has affected nearly 80,000 people [...]. There are moreover already 167 applications pending before the Court brought by Bug River claimants. This is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents *a threat to the future effectiveness of the Convention machinery*. Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that *general measures at national level are undoubtedly called for in execution of the present judgment*, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause.¹⁰⁴

After this "pilot" judgment, Poland adopted a new law granting to all expropriated owners or their heirs compensation up to twenty percent of the original value of their land. This paved the way for a friendly settlement with the Broniowski family, entered into before the ECtHR and included in a second judgment of September 28, 2005.

Commentators differ in their assessment of the extent to which the pilot judgment procedure can alleviate the caseload of the ECtHR.¹⁰⁵

104. *Id.* at ¶ 193 (emphasis added).

105. See, e.g., Valerio Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdivic Cases*, 7 HUMAN RIGHTS. L. REV. 396, 396-411 (2007); Dilek Kurban, *Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 16 HUMAN RIGHTS. L. REV. 731, 731-69 (2016); Philip Leach, Helen Hardman & Svetlana Stephenson, *Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia*, 10 HUMAN RIGHTS. L. REV. 346, 346-59 (2010); Costas Paraskeva, *Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights*, HUMAN RIGHTS. COMMENT. (2003),

However, before we go deeper into questions related to (potential) reforms at the ECtHR, we will now turn to the European Union and the protection of human rights provided by the European Court of Justice in Luxembourg.

III. HISTORY AND EVOLUTION OF HUMAN RIGHTS PROTECTION IN THE EUROPEAN UNION SYSTEM

A. From Treaties to Constitutional Order

European integration as we know it today started in 1951 with the negotiation and subsequent ratification of the Treaty Establishing the European Coal and Steel Community (“ECSC-Treaty”).¹⁰⁶ By contrast to many earlier attempts at European integration,¹⁰⁷ the model proposed by Jean Monnet and Robert Schuman was based on collaboration of the European States as equals, including the “arch enemies” France and Germany. Future wars in Europe were to be made impossible via the supranationalization of the crucial coal and steel industries and their submission to the control of a “High Authority” composed of apolitical technocrats from all participating States. The fact that the ECSC-Treaty also provided for a parliamentary assembly and a court of justice shows that the founding fathers did not only have the administration of coal

available at: <http://beta.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/pilotjudgmentprocedure.pdf>; Stuart Wallace, *Much ado about nothing: The Pilot Judgment Procedure at the European Court of Human Rights*, 11 EUR. HUM. RTS. L. REV. 71 (2011); Boštjan M. Zupančič, *Article 46 Systemic Problems – Application of the ‘Pilot Judgment’ Procedure, Broniowski v. Poland*, in BOŠTJAN M. ZUPANČIČ, *THE OWLETS OF MINERVA – HUMAN RIGHTS IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 501-512 (2012).

106. This Treaty expired after 50 years, as planned, and its provisions were integrated into the Treaty on European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”). Both of those will be briefly addressed below. The ECSC-Treaty can still be found at: TREATY CONSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY (1951), <https://www.consilium.europa.eu/uedocs/cmsUpload/Treaty%20constituting%20the%20European%20Coal%20and%20Steel%20Community.pdf>.

107. Foerster documented no fewer than 182 proposals for European integration made between 1300 and 1946. See ROLF HELLMUT FOERSTER, *DIE IDEE EUROPA 1300-1946: GESCHICHTE EINER POLITISCHEN IDEE*, DTV VERLAG (1963). See also Patrick Pasture, *Imagining European Unity Since 1000 AD* (2015).

and steel production in mind.¹⁰⁸ In addition to France and Germany, the Treaty was ratified by Belgium, Italy, Luxembourg, and the Netherlands.¹⁰⁹

While loftier attempts at defense and political cooperation failed initially,¹¹⁰ the Treaty Establishing the European Economic Community (“EEC”) and the Treaty Establishing the European Atomic Energy Community (“Euratom”) were added in 1957. Although the EEC-Treaty contained references, *inter alia*, to the free movement of workers in the Community,¹¹¹ prohibited any discrimination on grounds of nationality,¹¹² mandated “the principle that men and women

108. See, e.g., MERRY BROMBERGER & SERGE BROMBERGER, *JEAN MONNET AND THE UNITED STATES OF EUROPE* 95 (1968) (in particular, pages 95 et seq.); JEAN MONNET, *MÉMOIRES* 373 (1997).

109. The European Communities operated with six Member States until 1973, when Denmark, Ireland, and the United Kingdom joined. Greece was admitted in 1981, and Portugal and Spain in 1986, after a first major overhaul of the founding treaties which created the possibility of majority voting in certain instances, the so-called Single European Act. In 1995, Austria, Finland and Sweden joined, bringing the membership up to 15. By then, the perspective of reform in Central and Eastern Europe and the potential accession of many CEECs to the EU had become concrete, which necessitated fundamental overhauls in the institutional structure and decision-making mechanisms of the EU. These were implemented via the 1992 Maastricht Treaty, the 1997 Treaty of Amsterdam, the 2001 Treaty of Nice, and the 2007 Treaty of Lisbon, all of which can be accessed at: EU TREATIES (2017), https://europa.eu/european-union/law/treaties_en. The reforms paved the way for accession of Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia in 2004, as well as Bulgaria and Romania in 2007. Last but not least, accession of Croatia in 2013 brought the membership up to the current number of 28 European States. While the UK is potentially negotiating an exit from the EU, Albania, Montenegro, Serbia, The Former Yugoslav Republic of Macedonia, and Turkey are official candidates for accession and Bosnia and Herzegovina, as well as Kosovo have been recognized as potential candidates. See Emmert & Petrović, *supra* note 20, at 1349.

110. See Unofficial English translation of the 1952 European Defense Community Treaty prepared for the President of the United States, <http://aei.pitt.edu/5201/1/5201.pdf>. See also Josef L. Kunz, *Treaty Establishing the European Defense Community*, 47 *Am. J. Int'l L.* 275, 275-81 (1953). The draft Treaty Embodying the Statute of the European [Political] Community can be accessed via http://www.cvce.eu/obj/draft_treaty_embodiment_of_the_statute_of_the_european_community_strasbourg_10_march_1953-en-807979a3-4147-427e-86b9-565a0b917d4f.html. See also Bromberger & Bromberger, op cit., note 108, *Chapter IX. The European Defense Community*, pp. 108-121.

111. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 48, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

112. See *id.*, arts. 7, 48(2), 65.

should receive equal pay for equal work,”¹¹³ and provided extensive legislative powers for the Council of Ministers, it did not contain a general Bill of Rights. This can be explained by the fact that the Council of Ministers, as the decision-making body of the European Communities, was composed of delegates from the governments of the Member States, the latter of which had just ratified and were bound by the European Convention on Human Rights and Fundamental Freedoms, in addition to their respective national constitutional human rights provisions.¹¹⁴ Furthermore, the acts adopted by the EC were considered by the Member States like any other acts of an international organization and thus without direct applicability and direct effect in the Member States or, as an American lawyer might call it, they were not supposed to be self-executing.¹¹⁵

However, the EEC-Treaty provided for a procedure that sets the European Communities apart from any other international organization. Every other international court in the world, including the International Court of Justice of the UN in the Hague (“ICJ”), and even the European Court of Human Rights in Strasbourg, depends on voluntary collaboration by the governments of the signatory states for the recognition and implementation of its judgments. A good example how this works – or rather does not work – is the famous decision of the ICJ in

113. *Id.*, art. 119.

114. As Elizabeth Defeis has pointed out, there was also a perception that human rights were more appropriately addressed in other fora, such as the United Nations, that had adopted the Universal Declaration of Human Rights and the Genocide Convention in 1948 and were working on what was to become the International Covenant for Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights in 1966. See Elizabeth Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 *FORDHAM INT’L L.J.* 1104, 1105 (2008).

115. The attitude of the Member State governments in this regard is clearly illustrated in the submissions made to the European Court of Justice in the context of the hearings that led to the famous judgment in *van Gend & Loos*, Case 26/62, [1963] E.C.R. 1. See FRANK EMMERT, *EUROPEAN UNION LAW CASES 14-15* (2007). What is interesting, however, is that the 1953 Draft European Political Community Treaty included the following Article 3: “Les dispositions du titre I de la Convention de sauvegarde des droits de l’homme et des libertés fondamentales, signée à Rome le 4 novembre 1950, ainsi que celles du protocole additionnel, signé à Paris le 20 mars 1952, sont parties intégrantes du présent Statut.” [The provisions of Title I of the European Convention on Human Rights and Fundamental Freedoms . . . as well as those of the First Protocol . . . are an integral part of the present Statute.]

Nicaragua v. United States.¹¹⁶ From 1937 to 1979, Nicaragua was ruled by the Somoza family, an increasingly corrupt but U.S. friendly dictatorship. In 1979, a popular uprising brought a socialist movement to power. The so-called “Sandinistas” took their name from Augusto César Sandino, the leader of a peasant movement in the 1920s that opposed the US occupation of Nicaragua and the regime propped up by it. The Sandinistas were a thorn in the side of the US Government and a counter-revolutionary force called “the Contras” was first supported under President Carter and later under President Reagan. In 1984, the Nicaraguan government brought a case against the United States before the ICJ complaining about financial and other support to the Contras and direct military involvement by the CIA on its territory. In 1986, the ICJ ruled that the United States, “by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State”.¹¹⁷ The ICJ also found the United States in breach of various treaty obligations and decided “that the United States of America is under a duty immediately to cease and to refrain from all such acts” and “that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua”.¹¹⁸

As was to be expected, Nicaragua is waiting to this day for the reparation payments by the United States. The only tangible outcome of the judgment was a change in the policy of the US Government toward the ICJ, which triggered what has been called a general decline of the World Court.¹¹⁹ Although Article 94(1) of the UN Charter places

116. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27), [hereinafter *Nicaragua v. US*], available at: <http://www.icj-cij.org/docket/files/70/6503.pdf>

117. *Id.* at ¶ 292(3).

118. *Id.* at ¶ 292(13).

119. Eric A. Posner, *The Decline of the International Court of Justice*, U Chicago Law & Economics, Olin Working Paper No. 233 (2004). See also Janina Satzger, *Explaining the Decreased Use of International Courts – The Case of the ICJ*, 3 REV. L. ECON. 11 (2007);

an obligation on all UN member states “to comply with the decisions of the International Court in any case to which it is a party”, Article 36(2) of the Statute of the International Court of Justice makes it all too easy for States to ensure that they won’t become parties in a case before the ICJ in the first place. This provision requires a voluntary declaration of submission to the compulsory jurisdiction of the ICJ before a case can be brought against a State. Prior to the Nicaragua proceedings, the United States had been subject to the jurisdiction of the ICJ via a declaration of submission from 1946 and a number of bilateral and multilateral treaties. After 1986, the United States did not renew the general submission.¹²⁰

The Nicaragua case is merely an illustration of the general malaise affecting all international courts and tribunals. Even if they have jurisdiction and a case cannot be prevented by the defendant state, since the courts do not have police powers or bailiffs or sheriffs of their own, their decisions will only be recognized and enforced by a state if the latter considers it politically opportune to do so. This is not the place to elaborate on the reasons why states choose to comply with international court decisions in many cases. Suffice it to say that “tit for tat” and “naming and shaming” are amongst, if not the most powerful motivators. Indeed, Louis Henkin coined the famous phrase that most of the time most of the states actually comply with most of their obligations. However, this of course also means that every now and then every state does not. Moreover, the frequency of non-compliance will be directly correlated to the frequency of embarrassing or costly decisions being taken by the international courts or tribunals. If a court only hands down a handful of decisions every year, as it is the case with the ICJ, non-compliance will not normally be a major issue since the countries most likely not to comply will already not have deposited a submission to its jurisdiction in the first place. However, if a court like the European Court of Justice hands down over 1,000 decisions in a year, the story could be quite different.

Indeed, the EEC-Treaty did, and its successor, the Treaty on the Functioning of the European Union (“TFEU”) still does provide for a

Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR J. INT’L L. 815 (2007).

120. For further analysis see Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, in *THE SWORD AND SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* (Cesare Romano ed., 2008); Louis B. Sohn, *American Acceptance of the Jurisdiction of the International Court of Justice: Experiences and Prospects*, 19 GA. J. INT’L & COMP. L. 489, 489 (1989).

number of procedures that result in declaratory judgments like the one of the ICJ in the *Nicaragua* case. Specifically the procedure by which Member States can be held accountable, Article 258 TFEU (formerly Article 169 ECT) can be invoked only by the EU Commission and is not open to private individuals as plaintiffs. Furthermore, the outcome is a judgment that is binding but requires voluntary recognition and enforcement by the Member States. The only remedy for non-compliance is another trip to the European Court of Justice pursuant to Article 260 TFEU (formerly Article 171 ECT), resulting in another declaratory judgment which can again be ignored more or less at will.¹²¹ It should be easy to see that repeated problems and resort to the 171/260 procedure will ultimately do more damage to the legitimacy of the European Court of Justice than to the reputation of the Member States.¹²²

However, there is another procedure before the European Court of Justice that functions quite differently. Pursuant to Article 267 TFEU (formerly Article 177 ECT):

The Court of Justice shall have *jurisdiction* to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before *any court or tribunal* of a Member State, that court or tribunal *may*, if it considers that a

121. Since the entry into force of the Maastricht Treaty in 1993, the Court has the power to “specify the amount of the lump sum or penalty payment to be paid by the Member State” for non-compliance with the 169/258 decision. This, however, is also just part of a declaratory judgment and it is not at all clear why a Member State that did not want to comply with its obligations from the outset and did not comply after a conviction by the Court should now be willing not only to comply but also to pay a penalty. For further analysis, see L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 117-25 (5th ed.) (2000).

122. The European Parliament receives annual reports about compliance by the Member States with Arts. 258 and 260 TFEU. The most recent report is available at: http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_33/com_2016_463_en.pdf. See also FRANK EMMERT, *DER EUROPÄISCHE GERICHTSHOF ALS GARANT DER RECHTSGEMEINSCHAFT* (1998), available at: https://www.researchgate.net/profile/Frank_Emmert2.

decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is *no judicial remedy* under national law, that court or tribunal *shall* bring the matter before the Court . . .¹²³

The way this so-called preliminary rulings procedure works is as follows: In any case pending before a national court, either the applicant or the defendant or the court of its own motion raises one or more question(s) of EU law. For example, if a national of one Member State (the home state) is living and working in another Member State (the host state), the question may arise whether she should be able to get tax benefits from the host state for having a spouse in the home state if the host state generally grants tax benefits to married couples.¹²⁴ If the national court, based on the treaties and secondary legislation of the European Union and/or well-established case law of the ECJ, is able to answer the question on its own, it will move ahead and resolve the issue without involving the European Court. However, if the national court is unsure or otherwise does not feel able to give judgment without an authoritative decision by the ECJ on the question(s), it suspends the proceedings before it and sends the fact files with the question(s) to the Court in Luxembourg.

At the ECJ, the case is registered much like stand-alone proceedings. The Court opens a round of written proceedings where the parties submit their briefs, rebuttals and surrebuttals, invites the Commission and the Member States to submit observations, if they wish, and then schedules an oral hearing. At the hearing, the party representatives present summaries of their arguments, a Commission representative presents the views of the Commission how the case should be decided in the best interest of the European Union as a whole, and the judges and the advocate general ask any questions they may have. Subsequently, the advocate general prepares an opinion suggesting how the Court should rule and then the judges deliberate and decide how to answer the question(s). The final decision of the ECJ is handed down in the form of a judgment but takes a format along the following lines: “In a case such as this one, the way EU law and specifically Treaty articles X, Y, and Z and the provisions of Regulation/Directive

123. Consolidated Version of the Treaty on the Functioning of the European Union art. 267 [hereinafter TFEU] (emphasis added).

124. See *Köln-Altstadt v. Schumacker*, Case C-279/93, [1995] E.C.R. I-225.

... should be interpreted is as follows ...” This judgment is then sent back to the national court and the latter resumes its proceedings and decides the original case in front of it, taking account of the interpretation of EU law given to it by the ECJ.¹²⁵

The big and decisive difference to all other international court procedures is that the final decision on the rights and obligations of the parties to the dispute is handed down by the national court, i.e. the national court or judge who made the reference in the first place is now providing the final remedy or remedies based on the input of the European Court. While all states can and will ignore an international court decision from time to time if the political or economic cost is perceived as too high, no state that claims to follow the rule of law can afford to ignore a decision of one of its own courts. This would not only fly in the face of any democratic constitution, it would simply be the end of the separation of powers and the system of governance and rule of law as we know it. Since the national judge already voluntarily made the reference and is generally accustomed to the rule of law and not a political appointee, she is highly likely to follow the ECJ’s decision in her own ruling in the case. The only remedy available to the state or any other opposing party is an appeal to the next higher court in the respective Member State. That will rarely help, however. After all, the input from the European Court of Justice is not merely an advisory opinion or an amicus brief that depends on friendly reception by the friendly judge who made the reference. The judgment of the ECJ is binding on the national court and, because it provides an authoritative interpretation of the relevant EU law for all cases such as the one before the ECJ, it is also binding on all other courts in that Member State and in all other Member States of the European Union (*erga omnes*). This, of course, also includes the appellate court that might be called upon to review the decision of the first national judge or court. To be sure, the appellate court could call upon the ECJ a second time if it does not

125. There are many and many good publications about the European Court of Justice and the preliminary rulings procedure. *See, for example, MORTEN BROBERG & NIELS FENGER: PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE* (2d ed.) (2014); KOEN LENAERTS, IGNACE MASELIS & KATHLEEN GUTMAN, *EU PROCEDURAL LAW* 48-106, 215-49, 456-79, 783-97 (2015).

agree with the first decision. However, the European Court has generally taken the approach that a second reference in the same case is admissible only if new facts are presented and not merely because a national judge or court did not like the first answer provided by the ECJ.¹²⁶

Furthermore, since the ECJ provides an interpretation of the EU rules and does not decide a particular case or remedy, that interpretation in principle applies retroactively to the EU rules in question (*ex tunc*). A beautiful illustration of this principle was provided by the German beer dispute.

1. Erga Omnes Effect and Retroactivity of ECJ Judgments

The German Beer Purity Law, Case 178/84¹²⁷

As some readers may know, Germany has upheld the so-called Bavarian Beer Purity Law (“*Reinheitsgebot*”) since it was first adopted in 1516 to cut down on the widespread adulteration practice at the time where “beer” was stretched via the addition of other ingredients. Pursuant to the beer purity law, only water, malt (from barley or wheat), hops, and yeast must be used in the production of beer. This excludes both other natural ingredients such as rice or corn, as well as flavor additives like fruit juice or caramel, and it excludes chemical ingredients like preservatives.

The French brewery Fischer (*Brasserie du Pêcheur*), based in Strasbourg, had traditionally sold some of its products across the Rhine to German customers. However, as of 1981, the German authorities enforced the beer purity law and prevented further exports of Fischer beer to Germany. Whether pursuant to a complaint made by Fischer or others or of its own motion, the European Commission initiated Article 258 proceedings against Germany for preventing the importation and distribution of beer from other Member States. Germany, unsuccessfully, claimed that additions could cause health concerns in a country where more beer is consumed per capita than, for example, in France. The argument failed not only because Germany was unable to

126. *See* *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany*, Case 69/85, [1986] E.C.R. 947, ¶¶ 10-16.

127. Judgment of 12 March 1987, Case 178/84 *Commission v. Federal Republic of Germany*, [1987] E.C.R. 1227.

demonstrate real health issues with the ingredients in the French beer. It also did not object to the same ingredients if they were added to other food or beverages. In the end, the European Court of Justice held that Germany could require adequate labeling of all ingredients but could not prevent the importation and sale as “beer” of products lawfully made and/or marketed as such in other Member States. Hence, after the 1987 judgment, Fischer was able to rebuild its marketing connections in Germany.

Several years later, in a completely unconnected case, the European Court of Justice held for the first time that “the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.” This landmark judgment of November 19, 1991 in *Joined Cases C-6/90 and C-9/90 Francovich and Others v. Italian Republic*¹²⁸ caused quite a stir in the European Union and has since proven to be one of the most important enforcement tools for EU law. It also reached the lawyers who initially represented the Fischer brewery. Aware of the temporal effects of decisions by the ECJ, they now brought a case against Germany for damages suffered by their client during the years 1981 to 1987 when no beer could be sold in Germany. The time line here is of great importance! The Fischer lawyers were bringing a case in 1992 for damages suffered between 1981 and 1987, using the retroactivity of a judgment of the European Court of 1991. And they won! In *Joined Cases C-46/93 and C-48/93 Brasserie Pêcheur and Factortame*, the ECJ held on March 5, 1996 that in a case such as this one, the Member State – Germany – had to compensate a foreign manufacturer or trader – the Fischer brewery – for losses suffered prior to the *Francovich* decision due to the enforcement of national law – the beer purity law – in contravention to the free movement of goods in the European Union.¹²⁹

128. See *Francovich and Others v. Italian Republic*, Cases C-6/90 and C-9/90, [1991] E.C.R. I-5403. In many respects, the *Francovich* decision does the opposite of the US Supreme Court decision in *Alden v. Maine* 527 U.S. 706 (1999). Based on the Eleventh Amendment of the US Constitution, the several states enjoy sovereign immunity from being sued in federal court. Pursuant to their own constitutions, they may also enjoy sovereign immunity from being sued in their own courts. In *Alden v. Maine* the Supreme Court held that the US Congress cannot rely on Article I of the Constitution to subject non-consenting states to private law suits for damages in their own courts.

129. See *Brasserie Pêcheur and Factortame*, Cases C-46/93 and C-48/93, [1996] E.C.R. I-1029.

2. The Direct Effect or Self-Executing Nature of EU Law

Van Gend en Loos, Case 26/62

The importance of the Article 267 preliminary rulings procedure is hard to over-estimate. Long before the beer and Member State liability cases, the European Court used references by national courts to establish supremacy and direct effect of EU law.

As early as 1963, the European Court held in *Case 26/62 van Gend & Loos* that:

... the Community constitutes a *new legal order* of international law for the benefit of which the states have limited their sovereign rights, albeit with limited fields, and *the subjects of which comprise not only Member States but also their nationals*. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them *rights* which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.¹³⁰

Therefore, provisions of the treaties, as long as they are clear and precise, unconditional, and objectively suitable to be applied directly and without implementation by further legislative or administrative acts of the Member States, “produce direct effects in the legal relationship between Member States and their subjects.”¹³¹ The Court later expanded this to provisions contained in regulations¹³² and decisions¹³³ of the European Union. The direct effect of provisions in directives is a bit more complicated because directives are not originally intended to produce effects without legislative implementation by the Member

130. See *Van Gend & Loos*, Case 26/62, [1963] E.C.R. 1, at 12-13 (emphasis added).

131. *Id.*

132. See *Politi*, Case 43/71, [1971] E.C.R. 1039, at 1048; see also *Marimex*, Case 84/71, [1972] E.C.R. 89, at 96.

133. See *Grad*, Case 9/70, [1970] E.C.R. 825, at p. 837; *Haselhorst*, Case 23/70, [1970] E.C.R. 881, at 893.

States. Nevertheless, the Court has consistently held since 1974 that provisions in directives can produce direct effects at least in vertical cases between a Member State authority and an individual, if the Member State has failed to implement the directive on time and in a complete and correct manner into national law and has thus deprived the individual from the possibility of relying on EU conforming national law.¹³⁴

3. Supremacy of EU Law Over National Law

Costa v. ENEL, Case 6/64

Having thus established the direct effect or self-executing nature of almost all provisions of EU law in almost all possible constellations, the Court was also confronted with the question of hierarchy of norms if a provision of directly effective EU law should conflict with a provision of national law. Neither the EU Treaties themselves nor the constitutions of the original Member States (with the exception of the Netherlands) contain specific rules for the hierarchy between EU law and national law in case of conflict. Therefore, at least from the point of view of the majority of the Member States, the hierarchy would normally be determined by collision rules contained in national constitutional law and applicable to international agreements in general. These types of collision rules typically place international agreements on the same level as federal or national legislation, since they are

134. The vertical direct effect of directives in relations between individuals and public authorities was established in the Judgment of 4 December 1974. See van Duyn, Case 41/74, [1974] E.C.R. 1337, ¶¶ 9-15; See also Ratti, Case 148/78, [1979] E.C.R. 1629, ¶¶ 18-24; Becker, Case 8/81, [1982] E.C.R. 53, ¶¶ 17-25. Up to now, the ECJ has denied a similar horizontal effect of directives in relations between private individuals in order to protect legal certainty and the good faith reliance of one private party on the outdated national laws. See Marshall, Case 152/84, [1986] E.C.R. 723, ¶ 48. In such cases, where one private party relies on an unimplemented or poorly implemented directive and the other private party relies on the outdated national law, there is an obligation on the Member State courts, whenever the national law is open to interpretation, to achieve the results mandated by the directive via conforming interpretation of the national law. See Marleasing, Case C-106/89, [1990] E.C.R. I-4135. Finally, if such an indirect application of the directive is not possible, the private party claiming rights under an EU directive that has not been implemented by a Member State on time or in a complete and correct manner is directed toward liability of that Member State for its failure to transpose the directive. See, e.g., Faccini Dori, Case C-91/92, [1994] E.C.R. I-3325, ¶ 27. For comprehensive analysis see Emmert, *Horizontale Drittwirkung von Richtlinien? Lieber ein Ende mit Schrecken als ein Schrecken ohne Ende!*, *EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT* (1992) at 56-67, available at https://www.researchgate.net/profile/Frank_Emmert2.

normally approved and/or implemented by a legislative act of parliament. In general, therefore, international agreements are below the national constitution (unless they were ratified via a constitutional amendment) and in particular the structural core of the national constitution, including the bill of rights. International agreements usually have priority over older federal or national legislation, according to the principle *lex posterior derogat legi priori*. According to the same principle, however, subsequent federal or national laws have priority over older international agreements (because they are *legi posteriori*). Therefore, newer national laws may regulate an issue differently from older treaties and cause a breach of the international obligations towards other signatories of the international agreements. Whether a collision exists between an international agreement and a provision of national law is often a matter of interpretation and the interpretation of international agreements for purposes of domestic application – or the complete denial of domestic application because a treaty is supposedly not self-executing, i.e. not directly applicable – is, as a matter of course, under the exclusive and final authority of the national courts. Finally, as we have outlined above, international law does not have very good tools for ensuring compliance and often has to rely on “tit for tat” and “naming and shaming” to achieve a minimum level of recognition by states with different national laws and interests.¹³⁵

The problem in the European Union, whenever the interpretation or application of a rule is left to the Member States, is the inevitable divergence of national laws and interpretations and, as a consequence, differences of application of the law across twenty-eight Member States. This not only creates legal uncertainty for anyone wishing to buy or sell goods or services across Member State borders. It also causes discrimination between nationals from different Member States. The European Union and its Court of Justice, therefore, had a keen interest not only to declare EU law directly effective, hence accessible, in the Member States but also to establish its supremacy over contradictory national laws. The landmark decision to achieve this effect was *Case 6/64 Costa v. ENEL*, a judgment of July 15, 1964. The Court ruled that:

135. See FRANK EMMERT, *EUROPARECHT* 137-65 (1996). A shorter English translation can be found in a draft chapter of a future English version of my textbook at: https://www.researchgate.net/publication/265842413_Chapter_5_Fundamental_Principles_of_EU_Law_Draft.

[b]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, *the Member States have limited their sovereign rights*, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord *precedence* to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. *The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws*, without jeopardizing the attainment of the objectives of the Treaty set out in Article [3 TEU] and giving rise to the discrimination prohibited by Article [9 TEU and 10 TFEU]. The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. . . . It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.¹³⁶

Thus, via the preliminary rulings procedure under Article 267 TFEU, the European Court of Justice co-opts the national courts into implementing EU law in the Member States. Compliance with the judgments of the supranational court becomes a question of law instead of politics.¹³⁷

136. *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, at 593-94 (emphasis added).

137. To this day, the best analysis of the phenomenon is, at least in the views of the present authors, a 1991 article by Joe Weiler. See Joseph H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991). Careful study of this landmark analysis is highly recommended to anyone seriously interested in understanding European integration.

B. A Constitution Without a Bill of Rights

Although *Costa v. ENEL* initially established the supremacy of EU law only for a conflict between the founding treaties of the European Union and ordinary subsequent legislation of a Member State, the Court soon expanded this to a general supremacy of all EU law over all Member State law.¹³⁸ Unsurprisingly, this did not go down well with everyone in the Member States. Resistance did not come primarily from the governments of the Member States, however. Since EU law, back in the day, was essentially adopted by the Council of Ministers with mere “consultation” of the European Parliament, and in the Council of Ministers the Member States either had to find a consensus or at least usually did, the governments were not worried about unwelcome interference by EU law in their domestic business. Quite to the contrary, it soon became a common strategy for Member State governments who struggled to accomplish certain legislative projects at home, often because they did not have a sufficient majority in their own parliament or because of powerful opposition by national interest groups, to move the issue to the European level and legislate there instead. To the extent the Treaties did not provide clear legal bases for such legislation, the Member States could draw on Article 352 TFEU (formerly Article 235 EEC-Treaty = Article 308 EC-Treaty), the competence for unforeseen cases. The only safeguard against abuse in that Article was the requirement of unanimity or consensus among the Member States. As long as some Member States wanted to regulate a matter on the European level and the others were not strongly opposed, the principle of “you scratch my back [this time] and I’ll scratch yours [next time]” went surprisingly far in the Council.¹³⁹ The European Parliament did not have the power to stop expansive legislation and

138. See, e.g., *Simmenthal II*, Case 106/77, [1978] E.C.R. 629.

139. For additional analysis see Frank Emmert, *Auswertung der gesetzgeberischen Aktivität der EU vom 1. Januar 1992 bis zum 30. Juni 1998*, in STAATSRECHTLICHE AUSWIRKUNGEN EINER MITGLIEDSCHAFT IN DER EUROPÄISCHEN UNION 263-305 (Andreas Kellerhals, Andreas Auer, Bertil Cottier, & Frank Emmert, eds., 1999), available at: https://www.researchgate.net/publication/259893687_Auswertung_der_gesetzgeberischen_Tatigkeit_der_EU_zur_Abschätzung_der_Stellung_der_Schweiz_in_Rat_und_Parlament_der_EU_nach_einem_Beitritt.

also did not have the interest to do so because it was never meant to look after Member State prerogatives. And the national parliaments, at least for a couple of years, barely understood what was going on.¹⁴⁰

The resistance against supremacy and direct effect of EU law came initially and strongly from the national supreme courts. With their mandate to ensure compliance with national constitutions, and in particular their respective bills of rights, the national supreme courts did not at all appreciate the coming to life of a supranational body that claimed supremacy and direct effect for its legislative work, yet was not bound to respect specific rights and freedoms of its subjects and other affected parties. As a reminder, the European Union itself was not and still is not a member of the European Convention on Human Rights and Fundamental Freedoms, and the EU Treaties did not at the time contain a catalog of human rights and fundamental freedoms either. Thus, at least in theory, the Member State governments could have used the detour via the European Union not only to avoid political resistance in their home states but also to avoid legal scrutiny by their own constitutional guardians. The result was a veritable rebellion by several national supreme courts against the supremacy and direct effect of EU law and the monopoly of the European Court of Justice to decide upon its validity and interpretation.¹⁴¹ The German Bundesverfassungsgericht (BVerfG) probably delivered the most iconic statement when it held in a judgment of May 29, 1974 in *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* that it would accept complaints alleging a violation of German constitutional guarantees by EU law, as interpreted by the European Court of Justice “*so long as . . . the Community lacked a bill of fundamental rights enacted by a parliament, whose substance was*

140. The notable exception here is the Danish Folketing. See David Arter, *The Folketing and Denmark's 'European Policy': The Case of an 'Authorising Assembly'*, in NATIONAL PARLIAMENTS AND THE EUROPEAN UNION 110-23 (Philip Norton ed., 1999), as well as the other contributions in the same volume.

141. See, in particular, the judgment of the French Conseil d'Etat of 1 March 1968 in *Semoules de France* (No. 62814, Recueil Lebon); the judgment of the Belgian Cour de Cassation of 21 May 1971 in *Fromagerie "Le Ski"* (Journal des Tribunaux 1971, at 460, and [1972] CMLR 330); and the judgment of the Italian Corte Costituzionale of 27 December 1973 in *Frontini* ([1974] 2 CMLR 372).

(a) comparable to the catalog of fundamental rights contained in the Constitution of the Federal Republic and (b) reliably and unambiguously fixed for the future.”¹⁴² The decision gained instant fame under its German nickname “Solange I” (so long as . . .).¹⁴³

The problem with national review of EU law is not so much the fact that EU law will be subjected to a review of conformity with human rights and fundamental freedoms. The problem is that such a review undertaken in twenty-eight different Member States will not only cast endless uncertainty over the applicability of the rules, until each and every national supreme court with an interest in the matter has spoken. It will also, at least potentially, yield twenty-eight different results.

C. The Invention of Fundamental Rights in the EU Legal Order

1. Human Rights as General Principles of EU Law

Internationale Handelsgesellschaft, Case 11/70¹⁴⁴

The European Court of Justice decided to meet the challenge to its doctrines of supremacy and direct effect head on. As early as November 1969, it held in a case about privacy that EU rules had to be interpreted in a way that would prevent them from “prejudicing the fundamental rights enshrined in the *general principles of Community law* and protected by the Court.”¹⁴⁵ Shortly thereafter, in December 1970, the Court had an occasion to explain the *general principles* approach. *Internationale Handelsgesellschaft* was simultaneously

142. BVerfG BvL 52/71 (emphasis added). The judgment was delivered in German. The present translation is taken from THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES 419-23 (Andrew Oppenheimer ed., 1994).

143. *Id.*

144. *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125.

145. *Stauder*, Case 29/69, [1969] E.C.R. 419, at 425. In earlier cases, before the national challenges to the doctrines of supremacy and direct effect, the European Court had not been nearly as open minded about the protection of fundamental rights. See e.g., *Sgarlata v. Commission*, Case 40/64, [1965] E.C.R. 215. The applicant claimed if he would be denied standing under the old Art. 173 (now Art. 263 TFEU), “individuals would thus be deprived of all protection by the courts both under Community law and under national law, which would be contrary to the *fundamental principles governing all Member States*” (at p. 227, emphasis added). The answer of the ECJ was curt, however: “these considerations, *which will not be discussed here*, cannot be allowed to override the clearly restrictive wording of Article 173” *id.* (emphasis added). Since the ECJ did not want to discuss the problem of denial of justice at the EU and the national level, we will have to return to the matter below.

moving up in the national court hierarchy and was the same case that eventually triggered the notorious “Solange I” decision of the German Constitutional Court mentioned above. The European Court discussed the question of protection of fundamental rights in the Community legal system as follows:

(3) *Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law.* The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore *the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.*

(4) *However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.* The protection of such rights, whilst *inspired by the constitutional traditions common to the Member States*, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.¹⁴⁶

After analyzing “the constitutional traditions common to the Member States”, the Court went on to find that the respective EU regulation had *not* infringed fundamental rights of EU law. As a result, the corresponding decision of the German Verwaltungsgericht was

146. *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, ¶¶ 3 and 4 (emphasis added). For the fascinating story of how the French *Conseil Constitutionnel* (Constitutional Court) dealt in a similar manner with the lack of a bill of rights in the French Constitution of 1958 during much the same time, see Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *THE EU AND HUMAN RIGHTS* 859, 865 (Philip Alston, ed., 1999). Although de Witte does not have direct evidence, his speculation that the French, German, and EU constitutional courts were acutely aware of each other’s decisions is more than plausible.

appealed and the case eventually reached the German Constitutional Court.

2. Human Rights Found in Treaties Ratified by the Member States

Nold, Case 4/73¹⁴⁷

Just days before the BVerG ruled, the European Court reinforced its evolving doctrine of fundamental rights protection with the *Nold* decision:

(13) As the court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the court is *bound* to draw inspiration from constitutional traditions common to the Member States, and it *cannot* therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

The submissions of the applicant must be examined in the light of these principles.¹⁴⁸

What is remarkable in *Nold* is the fact that the Court states that it *cannot* uphold EU measures if they are incompatible with fundamental rights in the Member State constitutions. Also, there is a first hint that the European Convention on Human Rights and Fundamental Freedoms may be taken into account when assessing the scope of fundamental rights protection at the level of the EU institutions. Although the ECHR had entered into force already in 1953 and five out of the six founding Member States of the European Union were bound as of 1954 or 1955, it was not until May 3, 1974 that the ECHR became binding for France.

Nevertheless, as we have already seen, the BVerfG, on May 29, 1974, was not (yet) convinced of the system of protection of fundamental rights in EU law. Two things should not be misunderstood about

147. Nold v. Commission, Case 4/73, [1974] E.C.R. 491

148. *Ibid.*, ¶ 13 (emphasis added).

the *Solange I* decision, however. First, the very language of the German court left the door open for the possibility that at some point in time, the system at the EU level would be sufficiently developed so that (potential) national review would be no longer necessary. Second, the German court did not disagree with the assessment of fundamental rights by the European Court in the specific case. It also found that the rights of *Internationale Handelsgesellschaft* had *not* been unduly infringed upon. It merely stated that it would, for the time being, reserve the right to review the matter of compatibility with national guarantees of fundamental rights on a case-by-case basis.

3. Human Rights Protection Inspired by the ECHR

Hauer, Case 44/79¹⁴⁹

While the damocles sword of (potential) review at the national level kept hanging over the European Court of Justice, hence the threat to the uniformity of EU law across the Member States, and with it the threat to the unconditional supremacy of this EU law, the Court soldiered on and kept refining its doctrine of fundamental rights protection. As the decision in *Hauer* illustrates, the Court also kept emphasizing the importance of the matter and that it would not yield its ground:

(14) As the Court declared in its judgment of 17 December 1970, *Internationale Handelsgesellschaft* [1970] ECR 1125, the question of a possible infringement of fundamental rights by a measure of the Community institutions *can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.*

(15) The Court also emphasized in the judgment cited, and later in the judgment of 14 May 1974, *Nold* [1974] ECR 491, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding

149. Liselotte Hauer v. Land Rheinland-Pfalz, Case 44/79, [1979] E.C.R. 3727.

those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that *measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community*; and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. That conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case-law of the Court, refers on the one hand to the rights guaranteed by the constitutions of the Member States and on the other hand to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950

(16) In these circumstances, the doubts evinced by the [national court] as to the compatibility of the provisions of [EU] Regulation No 1162/76 with the rules concerning the protection of fundamental rights must be understood as questioning the validity of the regulation in the light of Community law.¹⁵⁰

4. Acceptance of Supremacy and Direct Effect by the National Supreme Courts

A number of decisions followed along similar lines,¹⁵¹ with the result that by 1986, the German Constitutional Court considered the system of protection of fundamental rights at the level of the European

150. *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, ¶¶ 13-15 (emphasis added).

151. See *Rutili v. Ministre de l'intérieur*, Case 36/75, [1975] E.C.R. 1219, ¶ 32; *Defrenne III v. Société anonyme belge de navigation aérienne Sabena*, Case 149/77, [1978] E.C.R. 1365; *Testa and Others v. Bundesanstalt für Arbeit*, Joined Cases 41, 121 and 796/79, [1980] E.C.R. 1979; *National Panasonic v. Commission*, Case 136/79, [1980] E.C.R. 2035, ¶¶ 17-21; *Regina v. Kirk*, Case 63/83, [1984] E.C.R. 2690, ¶ 22; *Biovilac v. European Economic Community*, Case 59/83, [1984] E.C.R. 4057; *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, 1986 E.C.R. 1663, ¶ 18.

Union to be sufficiently developed, although it was still based entirely on case law. Neither was there a “bill of fundamental rights enacted by a parliament” as the BVerG had demanded in *Solange I*, nor was the European Union formally bound by the ECHR. Nevertheless, after careful review of the case law of the ECJ and taking into account both the evolution of the case law of the European Court of Human Rights, to which the ECJ made regular references, and the endorsement of the ECJ’s case law in the Joint Declaration by the European Parliament, the Council and the Commission of 1977,¹⁵² the BVerfG, in a unanimous decision of October 22, 1986, decided:

In view of [the abovementioned] developments it must be held that, *so long as* the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against sovereign powers of the Communities which is to be regarded as *substantially similar* to the protection of fundamental rights required unconditionally by the [German] Constitution . . . the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation . . . within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the [German] Constitution; references to the [BVerfG] . . . for that purpose are therefore inadmissible.¹⁵³

The careful reader will appreciate the reversal of the *Solange* formula. Although the German court now accepts the level of protection of human rights in the European Union as adequate, it leaves the door open for a reversal of this assessment, should this level of protection at any time in the future no longer be “substantially similar” to the level of protection provided by the national constitution. Although the BVerG later accepted one challenge against provisions of EU law and laid down some outer guard rails for the interpretation of the Maastricht

152. Joint Declaration by the European Parliament, the Council and the Commission, 1977 O.J. C 103, at. 1.

153. BVerfGE, 2 BvR 197/83. The judgment was delivered in German. The present translation is taken from Oppenheimer, *supra* note 142 at 494 (emphasis added).

Treaty,¹⁵⁴ *Solange II* stands to this day and has contributed to similar reversals of earlier decisions in other Member States.¹⁵⁵

By the late 1980s, therefore, the supremacy and direct effect of EU law was generally accepted by the Member States and their constitutional courts, on account of the development by the European Court of Justice of a catalog of human rights substantially equivalent to the catalogs in the national constitutions and binding upon the EU institutions in their development and application of EU law.

5. National Authorities Bound by EU Human Rights?

Wachauf, Case 5/88¹⁵⁶

Emboldened by its achievement, the European Court decided to take another important step. For the first time in its Judgment of July 13, 1989, the Court held that *Member State authorities*, “when they implement Community rules,” also have to respect the fundamental rights guaranteed by EU law.¹⁵⁷ While Member State authorities continue to be bound by national human rights provisions when acting within their own sphere of powers, they have to apply a harmonized European standard of human rights protection when acting on the basis of EU laws and powers.¹⁵⁸ Even within their own sphere of powers,

154. To be precise, the challenge was directed at the German law approving the ratification of the Maastricht Treaty on European Union and specifically its provisions on monetary union and the replacement of the national currencies with the Euro. See BVerfG 2 BvR 2134, 2159/92 Oct. 12, 1993. The judgment was delivered in German. The present translation is taken Oppenheimer, *supra* note 142 at 526-527..

155. See, in particular, Conseil d’Etat, Oct. 20 1989, *Nicolo*, RFD Admin 1989, at 824. By contrast, the Italian Corte Costituzionale already reversed course. See *Granital*, Corte Cost. 8 giugno 1984 Foro Italiano 1984, at 2062. This may well have been a factor influencing the BVerfG.

156. See Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, Case 5/88, [1989] E.C.R. 2633.

157. *Ibid.*, ¶ 19.

158. See, *Elliniki Radio v. Dimotiki and Others*, Case C-260/89, [1991] E.C.R. I-2925, ¶ 42. This principle is also reflected in Charter of Fundamental Rights of the European Union art. 51, 2012 O.J. C 326/391; see, e.g., Angela Ward, Commentary on Article 51, in *The EU Charter of Fundamental Rights - a Commentary*, 1413-54 (2014).

Member States have to “exercise [their] competence consistently with Community law[,]”¹⁵⁹ which means, for example, that they must respect the principle of non-discrimination on grounds of nationality and the fundamental freedoms of movement of goods, persons, services, and capital.

To understand the significance of these decisions, we have to recall that the European Union is essentially a head without limbs. Although the European Union adopts large numbers of legislative acts that have direct effects in the Member States, it has very few administrative agents and by and large relies on the Member State authorities to apply its law. A good example is the area of external trade relations. The Common Customs Tariff is an EU regulation that not only applies in the Member States but also displaces and preempts any parallel national legislation.¹⁶⁰ Furthermore, the bulk of the customs revenue collected at the EU external borders goes directly to the European Union. Yet, the European Union does not have a single customs agent and is completely dependent on the national customs services of the Member States for the application of the Common Customs Tariff and the collection of any duties. As a consequence, a quest for comprehensive and uniform protection of fundamental rights under EU law would be incomplete if it only concerned the legislative activity of the European Union and its very limited administrative activity in areas such as competition and antidumping law. If and when EU law is applied by the Member States or even just touched upon, they should neither escape from EU guarantees of fundamental rights and freedoms – let alone any and all such guarantees – nor fall back on their national – and therefore different – systems of protection of fundamental rights.

159. See *Marks & Spencer v. David Halsey*, Case C-446/03, [2005] E.C.R. I-10866, ¶ 29.

160. The preemption of national implementation of EU regulations was first decreed in *Variola v. Amministrazione italiana delle Finanze*. See *Variola v. Amministrazione italiana delle Finanze*, Case 34/73, [1973] E.C.R. 981, ¶¶ 9-11.

D. The Codification of Fundamental Rights in the EU Charter

After the acrimonious procedures required for the adoption of the 1992 Maastricht Treaty on European Union,¹⁶¹ the EU mechanism of negotiating reform treaties was increasingly being criticized. In practice, the EU negotiated new treaties in intergovernmental conferences (“IGCs”) behind closed doors and then put the resulting formula compromises to the national parliaments and the occasional public referendum in an up or down vote. Detailed input from the national parliaments, let alone any other interest groups, was not part of the procedure. Although another intergovernmental conference was convened as early as 1995 to develop reforms of the European Union that would eventually enable it to admit a large number of new Member States from Central and Eastern Europe, the negotiations and ratification procedures were as difficult as with the Maastricht Treaty in spite of much more modest results in the so-called Amsterdam Treaty.¹⁶² Therefore, the heads of state and government of the Member

161. The treaty was negotiated and finalized in December 1991. It was signed on February 7, 1992, but then subjected to referenda in Denmark and France. French President Mitterrand had hoped to receive a glorious endorsement of his government but eventually suffered through a nail-biting experience where the Treaty (and by reflection his government) received a paltry 50.8 percent of support in the referendum. The situation was even more dire in Denmark where a majority of some 50,000 voters rejected the Treaty. This required re-negotiations and exceptions for the Danish to secure their approval in a second referendum. Already, the UK had been granted a number of opt-outs to make the Treaty acceptable to the British parliament. Finally, a number of German politicians brought a case against German ratification in the German Constitutional Court (BVerfG) that had to be won and triggered a number of conditions imposed on the interpretation of the Treaty to make it palatable to the Germans. Finally, on 1 November 1993, the Treaty, with all these modifications, exceptions and additional protocols, was able to enter into force. *See generally* THE RATIFICATION OF THE MAASTRICHT TREATY: ISSUES, DEBATES AND FUTURE IMPLICATIONS (Finn Laursen ed., 1994); COLETTE MAZZUCELLI, FRANCE AND GERMANY AT MAASTRICHT – POLITICS AND NEGOTIATIONS TO CREATE THE EUROPEAN UNION (1997). For analysis of the Treaty itself, see DAVID O’KEEFFE & PATRICK TWOMEY, LEGAL ISSUES OF THE MAASTRICHT TREATY (1994); THOMAS CHRISTIANSEN & SIMON DUKE, THE MAASTRICHT TREATY: SECOND THOUGHTS AFTER 20 YEARS (2013); *see also* KENNETH DYSON & KEVIN FEATHERSTONE, THE ROAD TO MAASTRICHT – NEGOTIATING ECONOMIC AND MONETARY UNION (1999) (analyzing the road toward European Economic and Monetary Union (“EMU”).

162. The Amsterdam Treaty was negotiated from June 1995 to October 1997 and eventually entered into force on May 1, 1999. *See* LEGAL ISSUES OF THE AMSTERDAM TREATY (David O’Keeffe & Patrick Twomey eds., 1999).

States (the “European Council”) decided on a different approach in 1999 and created a European Convention including not only government representatives but also delegates from the European and the national parliaments, to draft a *Charter of Fundamental Rights* for the European Union. Under the former German President Roman Herzog, the Convention rapidly produced the Charter, which was approved by the European Council in December 2000. However, the Council, for the time being, did not grant it the force of law.

Since the Convention process had been more successful than recent IGCs, a *Convention on the Future of Europe* was created in 2001 and charged with the development of a Constitution for Europe. This Convention had even wider membership, including from the CEECs who were at the time negotiating their accession to the European Union, generally met in public, and was chaired by the former French President Valéry Giscard d’Estaing. The *Draft Treaty Establishing a Constitution for Europe* was ready in July 2003 and included the Charter of Fundamental Rights from the first Convention as its bill of rights.¹⁶³ The provisions on the distribution of votes and seats in the institutions caused some further negotiations and delays but the Constitution was eventually signed on October 29, 2004 by the heads of state or government of the twenty-five Member States of the European Union.¹⁶⁴ It went on to be ratified by eighteen of these twenty-five states and the European Parliament. However, there was powerful resistance in some of the other Member States. British Prime Minister Tony Blair had announced a referendum, which was not constitutionally required, and the outcome was more than uncertain. However, even before Britain got a chance to shoot down the Constitution, public referenda in France and the Netherlands in May and June 2005 resulted in majority votes against the document. This is

163. The original Draft Treaty Establishing a Constitution for Europe was published in OJ 2003 C 169.

164. The final version was published in OJ 2004 C 310 and subsequently went to the national parliaments for ratification. *See* Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 310/1 (never ratified) [hereinafter Draft Constitutional Treaty].

not the time and place to analyze the reasons for the rejection;¹⁶⁵ however, since any treaty revision requires support by all Member States, the Constitution was effectively defeated and the fate of the Charter of Fundamental Rights was again in question.

Interestingly, the refusal of the European Council to grant binding status to the Charter in 2000 and the failure of the constitutional project in 2005 did not prevent the European Court of Justice from relying on the Charter in its case law on fundamental rights in the European Union. The first reference was by Advocate General (AG) Alber in his Opinion delivered on February 1, 2001 on *Case C-340/99 TNT Traco*.¹⁶⁶ A second reference was made by AG Tizzano in his opinion of February 8, 2001 on *Case C-173/99 BECTU*.¹⁶⁷ Although the Court of Justice did not immediately follow suit and did not make references to the Charter in the judgments in these cases, it took only a few days more for the Court of First Instance to make a first reference in the Judgment of February 20, 2001 in *Case T-112/98 Mannesmannröhren-Werke* to the Charter of Fundamental Rights. While the CFI held that the applicant could not rely on rights under the Charter since the contested measures of the Commission were adopted before the Charter was proclaimed in December 2000, it clearly left open the possibility that facts occurring after this date could be reviewed in light

165. Suffice it to say that discontent in France with the leadership of President Jacques Chirac and issues of immigration in the Netherlands played a major role, neither of which really had much or anything to do with the Constitution. See e.g., Achim Hurrelmann, *European Democracy, the 'Permissive Consensus' and the Collapse of the EU Constitution*, 13 EUR. L.J. 343 (2007); Henry Milner, "Yes to the Europe I want; No to this one." *Some Reflections on France's Rejection of the EU Constitution*, 39 POL. SCI. & POL. 257 (2006); Andrew Moravcsik, *What Can We Learn from the Collapse of the European Constitutional Project?*, 47 POLITISCHE VIERTELJAHRESZEITSCHRIFT 219 (2006); Andreas R.T. Schuck & Claes H. De Vreese, *The Dutch No to the EU Constitution: Assessing the Role of EU Skepticism and the Campaign*, 18 J. OF ELECTIONS, PUB. OPINION & PARTIES 101 (2008); Nick Startin & André Krouwel, *Euro-scepticism Re-galvanized: The Consequences of the 2005 French and Dutch Rejections of the EU Constitution*, 51 J. OF COMMON MKT. STUD. 65 (2012).

166. *TNT Traco SpA v. Poste Italiane SpA*, Case C-340/99, Opinion delivered 1 February 2001, [2001] E.C.R. I-4112, at ¶ 94.

167. *The Queen v. Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, Case C-173/99 Opinion delivered 8 February 2001, [2001] E.C.R. I-4883, at ¶¶ 26-28.

of the fundamental rights and freedoms protected by the Charter.¹⁶⁸ In spite of many more references by the Court of First Instance,¹⁶⁹ multiple references in judgments of the European Union Civil Service Tribunal,¹⁷⁰ and numerous references by almost all Advocates General,¹⁷¹ the European Court itself did not come around until 2006. Although already in late 2002, President Rodríguez Iglesias had made a specific reference to the Charter in the Order of the President of October 18, 2002 in *Case C-232/02 P(R) Technische Glaswerke Ilmenau*,¹⁷² the Court itself only mentioned the Charter when summarizing arguments of parties before it that had claimed rights under the Charter. For example in the Judgment of May 20, 2003 in

168. *Mannesmannröhren-Werke AG v. Commission of the European Communities*, Case T-112/98, [2001] E.C.R. II-732, ¶ 76.

169. *Territorio Histórico de Álava*, Case T-77/01, E.C.R. II-83 rec. 19 and 35 (reference to Art. 47 of the Charter next to Arts. 6 and 13 of the ECHR), [2002]; *max.mobil, paras. v. Commission of the European Communities*, Case T-54/99, [2002] E.C.R. II-313 ¶¶ 48 and 57 (application of the Charter as a confirmation of the constitutional traditions of the Member States); *Technische Glaswerke Ilmenau v. Commission of the European Communities*, Order of the President Case T-198/01 R, [2002] E.C.R. II-2153; *Jégo-Quére v. Commission of the European Communities*, Case T-177/01 2002 E.C.R. II-2368.

170. *See Pia Landgren v. European Training Foundation*, Case F-1/05, [2006], ECLI:EU:F:2006:112.

171. *See, e.g.*, Advocate General (AG) Mischo in his Opinion in *P D v. Council*, Case C-122/99, [2002]; AG Jacobs in his Opinion in *P Z v. Parliament*, Case C-270/99; AG Jacobs in his Opinion in *Netherlands v. Parliament and Council*, Case C-377/98, [2001]; AG Geelhoed in his Opinion in *Baumbast v. Secretary of State for the Home Department*, Case C-413/99, [2001]; AG Léger in *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten and Others*, Case C-309/99, [2001]; AG Léger in his Opinion in *P Council v. Hautala*, Case C-353/99, [2001]; AG Geelhoed in his Opinion in *Mulligan*, Case C-313/99, [2001]; AG Stix-Hackl in her Opinion in *Nilsson*, Case C-131/00, [2001]; AG Stix-Hackl in her Opinion in *MRAX v. Belgian State*, Case C-459/99, [2001]; AG Stix-Hackl in her Opinion in *Carpenter v. Secretary of State for the Home Department*, Case C-60/00, [2001]; AG Mischo in his Opinion in *Joined Cases C-20 and C-64/00 Booker Aquaculture* [2001]; AG Stix-Hackl in her Opinion in *Käserer Champignon* Case C-210/00, [2001]; AG Ruiz-Jarabo Colomer in his Opinion in *Überseering*, Case C-210/00, [2001]; AG Stix-Hackl in her Opinion in *Commission v. Italy*, Case C-224/00, [2001]; AG Geelhoed in his Opinion *D'Hoop*, Case C-224/98, [2002]; AG Jacobs in his Opinion in *P Unión de Pequeños Agricultores (UPA)*, Case C-50/00, [2002]; AG Jacobs in his Opinion in *Gemo*, Case C-126/01, [2002]; AG Jacobs in his Opinion in *Schmidberger*, Case C-112/00, [2002]; AG Geelhoed in his Opinion in *British American Tobacco*, Case C-491/01, [2002]; AG Ruiz-Jarabo Colomer in his Opinion in *P Volkswagen AG v. Commission*, Case C-338/00, [2002].

172. *Commission of the European Communities v. Technische Glaswerke Ilmenau*, Case C-232/02 P(R), [2002] E.C.R. I-8980, at ¶ 85.

Case C-465/00 Österreichischer Rundfunk, there is such a reference, but the Court eventually relied on the ECHR for the decision, including specific case law of the ECtHR.¹⁷³ Even when the Court was confronted with a direct question about the Charter in a request for a preliminary ruling,¹⁷⁴ the ECJ still avoided an answer in May 2005. Similarly, in October 2005, the ECJ declined to answer a request for a preliminary ruling whether national restrictions against the use of totalitarian symbols violated Article 10, Article 11 and Article 12 of the Charter because the situation was entirely internal to the Member State in question, hence did not fall under the scope of application of EU law.¹⁷⁵

The first real discussion of the Charter as a source of fundamental rights occurred, perhaps unsurprisingly, in an inter-institutional case, namely the Judgment of June 27, 2006 in *Case C-540/03 Parliament v. Council (Family Reunification Directive)*.¹⁷⁶ In this case, the Council argued that “various instruments of public international law invoked by the [European] Parliament” could not create rights to family reunification since the Community itself was not party to these instruments. The Council also argued against any reliance by the ECJ

173. *Rechnungshof v. Österreichischer Rundfunk*, Case C-465/00, [2003] ECLI:EU:C:2003:294. In paragraph 56, the Court merely recalls the UK’s submission that “the provisions of the Charter of Fundamental Rights of the European Union . . . to which the Verfassungsgericht [which made the request for a preliminary ruling] briefly refers, are of no relevance.” *Id.* at ¶ 56. Subsequently, in paragraph 73, the ECJ makes reference to several judgments of the ECtHR on privacy rights. *Id.* at ¶ 73. Further on, there are additional references to specific judgments of the ECtHR regarding justifications for breaches of fundamental rights. *Id.* at ¶ 83. Whether or not the Charter should be taken into account is not addressed directly by the Court.

174. *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale v. Ministero delle Politiche Agricole e Forestali*, Case C-347/03, [2005] E.C.R. I-3820. The Italian Tribunale amministrativo regionale del Lazio asked:

Does the right of ownership set out in Article 1 of Protocol No 1 to the European Convention on Human Rights and Fundamental Freedoms . . . and taken up in Article 17 of the Charter of fundamental rights of the European Union . . . also cover intellectual property in the names of the places of origin of wines and the exploitation thereof

Id. at ¶ 58.

175. Order of 6 October 2005 in Case C-328/04 *Attila Vajnai*, 2005, ECLI:EU:C:2005:596.

176. *Parliament v. Council (Family Reunification Directive)*, Case C-540/03, [2006] E.C.R. I-5809.

on the Charter of Fundamental Rights “given that the Charter does not constitute a source of Community law.”¹⁷⁷ In response, the ECJ not only affirmed the “special significance” of the ECHR in the determination of the general principles of EU law, it continued as follows:

(37) The Court has already had occasion to point out that the *International Covenant on Civil and Political Rights* is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law That is also true of the *Convention on the Rights of the Child* referred to above which, like the Covenant, binds each of the Member States.¹⁷⁸

The Court then went on to justify why it would also begin to draw inspiration from the Charter, in spite of the fact that it was not formally binding (yet):

(38) The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the . . . preamble to the Directive [at issue], that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court . . . and of the European Court of Human Rights’.¹⁷⁹

As it had already done on a number of previous occasions, the Court also made reference to a number of specific decisions of the ECtHR, rather than just the ECHR in general.¹⁸⁰

177. *Id.* at ¶ 34.

178. *Id.* at ¶ 37 (emphasis added).

179. *Id.* at ¶ 38.

180. *See id.* at ¶¶ 54-56, 65.

Even after this decision, it was not like the dam was finally broken. It took until the Judgment of March 13, 2007 in *Case C-432/05 Unibet* that the Court relied on the Charter again, and always in connection with the ECHR.¹⁸¹ But after that, the pace picked up and reference to the Charter became a regular feature of judgments of the ECJ, at least as an expression of human rights guaranteed in the EU via general principles of law and the constitutional traditions of the Member States as expressed *also* in the ECHR.¹⁸² In many ways, the Member States once again merely endorsed what the Court was already doing when, by way of the Lisbon Treaty, they declared the Charter “legally binding on the EU institutions and on national governments, just like the EU Treaties themselves”¹⁸³ as of December 1, 2009.

Once the Charter achieved formal binding status, the European Court of Justice started applying it – at least occasionally – *without simultaneous reference to the ECHR*. For example, in *WebMindLicenses (WML)*, a Hungarian businessman, with the use of shell companies in Portugal, had achieved a substantial reduction of his tax bills in Hungary for services provided via internet. The Court interpreted the relevant EU regulations and directives restrictively and confirmed the right of the Member State to intercept e-mails and other electronic communications in the course of an investigation of potential tax evasion. However, the Court also held that:

by virtue of Articles 7, 47 and 52(1) of the Charter it is incumbent upon the national court which reviews the legality of the decision founded on such evidence adjusting VAT to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. It is incumbent upon that court, furthermore, to verify whether, in accordance with the *general principle of observance of the rights of the defence*, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable

181. *Unibet v. Justitiekanslern*, Case C-432/05, [2007] ECR. I-2301.

182. See Gráinne de Búrca, *After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. L. 168-84 (2013).

183. This particular formula can be found on the website of the European Commission. See EU CHARTER OF HUMAN RIGHTS, EUROPEAN COMMISSION, http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (last visited Apr. 21, 2017).

person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter, it *must disregard that evidence and annul that decision* if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an inter partes procedure, that it was obtained in accordance with EU law.¹⁸⁴

IV. MY DREAMS ARE YOUR NIGHTMARES – THE STRENGTHS AND WEAKNESSES OF EACH OF THE TWO SUPRANATIONAL SYSTEMS OF PROTECTION OF HUMAN RIGHTS IN EUROPE

The introduction of a supranational system of human rights protection, in particular if it comes with some degree of effectiveness and enforceability, is bound to trigger criticism from different sides. Invariably, there will be those for whom the protection can hardly go far enough and who wish for wide access to and strict scrutiny by the supranational court(s). For others, no matter how timid the supranational review may be, any such interference with national sovereignty is an anathema. In order to provide a meaningful and critical analysis of the issues within a limited frame of time and space, we will summarize the most important criticism leveled by previous commentators at both systems and also try to add some of our own. Subsequently, in the final part, we will try to outline our own preferences for “the ideal” scenario how human rights and fundamental freedoms should be protected in the triangle between national constitutions and courts, the European Union with its ECJ, and the ECHR with its ECtHR, and some proposals how we might get there.

184. Judgment of 17 December 2015 in Case C-419/14, *WebMindLicenses Kft. v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, ECLI:EU:C:2015:832, ¶ 91 (emphasis added).

A. Criticism of the ECHR and the European Court of Human Rights

The way things should work under the ECHR is that a person who is “claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”¹⁸⁵ can bring an individual application to the ECtHR “after all domestic remedies have been exhausted . . . and within a period of six months from the date on which the final decision was taken.”¹⁸⁶ If these formal criteria are fulfilled, the Court can only reject a case as inadmissible if:

. . . it considers that

- a. the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
- b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.¹⁸⁷

If a case goes ahead and “if the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”¹⁸⁸ In such cases, the decision of the Court is by judgment, which has to be reasoned and comes with binding force on the Contracting Parties.¹⁸⁹ The execution of the judgment by the Contracting Party concerned is monitored by the Committee of Ministers.¹⁹⁰

Although there will always be a number of applications by individuals who do not understand the system or who feel violated in their human rights or fundamental freedoms although this perception may be “manifestly ill-founded”, there should really not be a large number of complaints to the ECtHR if the national legal systems and the national courts are doing their job. After all, no case can be brought to Strasbourg unless “all domestic remedies have been exhausted”, which

185. ECHR, *supra* note 8, art. 34.

186. *Id.*, art. 35(1).

187. *Id.*, art. 35(3). Subparagraph (b) was added by Protocol 14 and entered into effect on 1 June 2010.

188. *Id.*, art. 41.

189. *See id.*, arts. 45-46.

190. *See id.*, art. 46.

would normally require a case to be brought to trial court, the judgment of the trial court to be appealed, and quite often even a further appeal to the highest or supreme court of the respective country. Somehow one would assume that 99.9% of all complaints about violations of human rights or fundamental freedoms should be taken care of in an adequate and satisfactory way at the national level. Fortunately, this is indeed what happens with many of the Contracting Parties. Unfortunately, it is not happening in all of them. For the rare and unusual cases from the Contracting Parties with the best human rights record and for the more common and even repetitive cases from those with not so stellar records, the supranational system becomes crucial. However, Barkhuysen and van Emmerik have noted:

Effective protection of human rights first of all requires the availability to an individual of an accessible, fast and professional procedure. The Strasbourg supervisory procedure does not comply completely with these criteria. It is relatively inaccessible, rather slow and burdensome. [...] Added to this is the fact not everyone can afford the time and money to go to Strasbourg. A second requirement of crucial importance to any procedure for the effective protection of human rights is that actual redress be guaranteed in case a fundamental right has been violated. The Strasbourg procedure cannot sufficiently meet this requirement. This is because judgments of the Court do not automatically nullify actions of contracting states that constitute violations of the Convention. In case a state does not honour a positive obligation deriving from the Convention, a Strasbourg judgment does not automatically provide an applicant with a claim to the state's (belated) action. The judgment has a declaratory character only: it merely contains a binding statement of a violation. States are obliged to provide redress, but it is left to their discretion how to honour this obligation. The Court lacks the authority to declare legislation or measures conflicting with the Convention void, nor can it review irrevocable verdicts of domestic courts. The Court is also not authorised to order the relevant contracting state to act. The Committee of Ministers however supervises the enforcement of Strasbourg judgments. Still, a complaint frequently heard is that a Strasbourg 'victory' brings the applicant little or no gain. In many contracting states [...], applicants have few or no options to claim redress based on a judgment of the Court. So far, case-law has not established whether an individual can complain in Strasbourg of a violation of Article 46 paragraph 1 ECHR (the obligation of a state to conform to judgments of the Court) when a

contracting state does not implement a judgment. Nonetheless, based on Article 41 ECHR the Court has the authority to award the victim ‘just satisfaction’.¹⁹¹

We will address the different elements of criticism in turn.

1. The Case-Load Problem

“It is in the interests of European citizens that, as it stands, the caseload of the European Court of Human Rights be acknowledged as an obstacle to the effective protection of human rights in Europe.”

– Sir Francis Jacobs¹⁹²

From 1959 to the end of 2016, the ECtHR examined about 712,600 applications.¹⁹³ This enormous number does not even include applications that were dealt with by the European Commission of Human Rights when it still had a pre-screening function prior to the entry into force of Protocol 11 on November 1, 1998. The 712,600 applications that made it to the Court resulted in about 19,500 judgments,¹⁹⁴ i.e. about 2.74% of examined applications make it on to a judgment. Once a case does get through, however, the Court finds a violation of one or more Convention rights in some eighty-four percent of the cases.¹⁹⁵ Pretty much all of the other applications, i.e. some 97.26%, are declared “manifestly inadmissible” since this was the ECtHR’s only mechanism of docket control prior to the entry into force of Protocol 14 on June 1, 2010. Most recently, presumably, the Court is also refusing some cases because the applicant has not suffered a significant disadvantage. Unfortunately, whether or not a case is manifestly ill-founded, or whether or not it should be examined out of “respect for human rights” in spite of relatively insignificant

191. Tom Barkhuysen & Michiel L. van Emmerik, *Legal Protection Against Violations of the European Convention on Human Rights: Improving (Co-)operation of Strasbourg and Domestic Institutions*, 12 LEIDEN J. INT’L L. 833, 834-35 (1999).

192. Sir Francis Jacobs, *Foreword* to Statement on Case-Overload at the European Court of Human Rights (2012).

193. See EUR. CT. HUM. RTS./COUNCIL OF EUROPE, ECHR OVERVIEW 1959-2016, 4 (2017), available at: http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf.

194. *Id.* at 3.

195. *Id.*

disadvantage, is at least as much determined by the Court's effort to reduce back-log and case load as it is by the actual facts of the matter. A short look at the back-log of pending applications referred to a judicial body, that means meeting the formal criteria of admissibility, illustrates the problem:

Year	Cases pending before a judicial formation on January 1 ¹⁹⁶
1999	7,800
2000	12,600
2001	15,900
2002	19,800
2003	29,400
2004	38,500
2005	50,000
2006	56,800
2007	66,500
2008	79,500
2009	97,300
2010	119,300
2011	139,650
2012	151,600
2013	128,100
2014	99,900
2015	69,900
2016	64,850
2017	79,750

The fact that the ECtHR was able to bring down the back-log from over 150,000 to some 65,000 from 2012 to 2016 was celebrated by some as if the problem of the overload of the Court has already been solved.¹⁹⁷ This seems highly problematic to the present authors. First, the fact that more cases have been disposed of says little about the

196. See STATISTICAL REPORTS, EUROPEAN COURT OF HUMAN RIGHTS (2017), <http://www.echr.coe.int/Pages/home.aspx?p=reports&c=>.

197. In REPORT OF THE STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH), THE LONGER-TERM FUTURE OF THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Dec. 11, 2015) [hereinafter STEERING COMMITTEE REPORT], we find the following optimistic passage: "Concerning the challenge of the caseload, *no further measures appear necessary* regarding the clearance of the backlog of clearly inadmissible and repetitive cases. The former has now been cleared and it is expected that the backlog of the latter will be cleared within two or three years. Thus the report focuses on the measures needed to respond to the main remaining challenges: the clearing of the backlog of non-repetitive pending cases, both priority and non-priority ones, the reduction and the handling of the annual influx of cases in general, large-scale violations as well as systemic issues. *In view of the positive results of the Court's reforms so far, the challenge of clearing the backlog of non-repetitive priority and non-priority cases may entail allocating additional resources and more efficient working methods rather than introducing a major reform.*" *Id.* at 11 (emphasis added).

quality of the accelerated processing. An illustration will be given below. Second, the most recent numbers show an increase of pending cases, which could be a sign that measures taken at the Court after June 2010 have brought only temporary relief. Third, a new wave of cases may be building up on the horizon if and when Protocol 16 enters into force and allows the highest courts of the Contracting Parties to request “advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto” (Article 1(1)). Although this option will only be available to the highest courts of the countries that ratify the Protocol and only in the context of an actual case pending before the national court (Article 1(2)), the ECtHR will have to commit resources above average to these kind of inquiries since it will want to provide the highest courts of the Contracting Parties only with well-reasoned and broadly supported feedback.¹⁹⁸

2. Justice Delayed Is Justice Denied

While a high number of pending cases does not have to be a problem per se, the consequences are manifold. First, there are the delays. Second, there are the concerns about the quality of the workmanship, both in the pre-screening and in the actual adjudication of admissible cases. Third, there is the problem of signal vs. noise, and the absorption capacity of the interlocutors of the Court in the national legal system and global academia.

With regard to the delays, the Court says that it “endeavours to deal with cases within three years after they are brought.”¹⁹⁹ The reality

198. See STEVEN GREER, EUR. CONV. ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 192 (2006). Steven Greer makes another point against the introduction of the advisory opinion procedure. He argues that “since advisory opinions can only be expressed in vague and general terms, they are unlikely to add anything of substance to the future of the Convention system.” *Id.* The supporters of the procedure argue that it will stimulate a dialogue between the national supreme courts and the ECtHR and promote collaboration.

199. See *The ECHR in 50 Questions*, EUR. CT. H.R., at 9 (Feb. 2014). Indeed, the Brighton Declaration of 19/20 April 2012 envisages a time-limit of one year for the first communication and another two years until the final decision, i.e. an overall time-limit of three years, for proceedings before the ECtHR. HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS, BRIGHTON DECLARATION (2012), at ¶ 21h.

is a bit different, however. Although the ECtHR does not publish statistics on the average duration of cases before it, some conclusions can be drawn from its annual reports and other sources of information on the backlog at the Court. These reveal that it usually takes well over one year for the decision on admissibility to be taken. A decision on the merits may take five years and sometimes more. Most recently, the Court has given priority to so-called meritorious cases that raise important or urgent issues.²⁰⁰ By necessity, this further delays meritorious cases considered routine, repetitive, or otherwise of little (legal) interest. In addition, what must be taken into account is also the duration of *the implementation* of the ECtHR judgments *at the national level*. Even in the Western countries, the execution of the judgments takes several years, with an average around three and a half years. In some of the CEECs, it takes considerably longer. For example, the average duration of the execution in leading cases against Ukraine was seven years and four months when looking at cases that were before the Committee of Ministers as of December 31, 2014.²⁰¹ This means that it can easily take five to ten years for a meritorious case to be finally resolved.

This puts the ECtHR in a somewhat awkward situation when criticizing the length of proceedings at the national law. Indeed, the ECtHR is confronted with hundreds of applications every year claiming a violation of Article 6 of the Convention, the right to a fair trial, because of unduly lengthy proceedings before the national courts. It has even been said that “[t]his single issue still accounts for more judgments of the Court than any other”²⁰² and some years ago the so-called “Italian length of proceedings cases” contributed no less than twenty-five percent of the total workload of the Court.²⁰³ The flood of cases from Italy became so untenable that the ECtHR took the extreme step of reversing the burden of proof, essentially stipulating that applications from Italy citing unduly lengthy proceedings would

200. The priority criteria applied by the ECtHR are outlined in the CDDH report. *See* STEERING COMMITTEE REPORT, *supra* note 197, at ¶ 76(v) and corresponding n.99.

201. *See* ALICE DONALD & PHILIP LEACH, *PARLIAMENTS AND THE EUROPEAN COURT OF HUMAN RIGHTS* 17, t.1.3 (2016).

202. *See* Martin Kuijer, *The Right to a Fair Trial: Effective Remedy for Excessively Lengthy Proceedings (Articles 6 and 13 ECHR)*, presented at the conference on “Effective Remedies, Lengthy Proceedings and Access to Justice in the EU” in Cracow, Poland, Feb 28 2013, http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights,%20and%20Access%20to%20Justice%20Seminar/KUIJER_Martin_Presentation_Krakow_2013.pdf, at 1.

203. *Id.*

automatically be upheld because of *a systemic failure in the administration of justice in Italy*. What was on trial was no longer the duration of an individual case but an entire judicial system:

21. The Court notes at the outset that Article 6 § 1 of the Convention imposes on the Contracting States the duty *to organise their judicial systems* in such a way that their courts can meet the [requirement of providing a hearing within a reasonable time by a tribunal]. It wishes to reaffirm the importance of administering justice without delays which might jeopardise its effectiveness and credibility [...]. It points out, moreover, that the Committee of Ministers of the Council of Europe, in its Resolution DH (97) 336 of 11 July 1997 (Length of civil proceedings in Italy: supplementary measures of a general character), considered that “excessive delays in the administration of justice constitute an important danger, in particular for the respect of the rule of law.

The Court next draws attention to the fact that since 25 June 1987, the date of the *Capuano v. Italy* judgment (Series A no. 119), it has already delivered sixty-five judgments in which it has found violations of Article 6 Section 1 in proceedings exceeding a “reasonable time” in the civil courts of the various regions of Italy. Similarly, under former Articles 31 and 32 of the Convention, more than 1,400 reports of the Commission resulted in resolutions by the Committee of Ministers finding Italy in breach of Article 6 of the Convention for the same reason.

The frequency with which violations are found shows that there is an accumulation of identical breaches which are sufficiently numerous to amount not merely to isolated incidents. Such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy.

This accumulation of breaches accordingly constitutes a practice that is incompatible with the Convention.²⁰⁴

In this way, Italy was regularly convicted to pay compensation for undue length of proceedings. The “solution” was classic. Instead of a structural reform of the judicial system, Italy introduced a law allowing

204. See *Ferrari v. Italy*, No. 33440/96 EUR. CT. H.R. (July 28, 1999), at ¶ 21 (emphasis added).

for *domestic compensation* for undue length of proceedings. As a consequence, the violations of the right to a fair trial continue largely unabated but the cases being brought to Strasbourg are now no longer about the question *whether* there should be compensation for the undue length of the proceedings but about “the amount of compensation offered domestically and the fact that the compensation proceedings in themselves were taking too long.”²⁰⁵

As mentioned earlier, it is a bit disingenuous for the European Court to set standards for the national courts for the reasonable length of proceedings,²⁰⁶ if the European Court itself is unable to abide by these standards. We shall return to this issue when looking at potential remedies below.

3. Docket Control, Strasbourg Style

Until recently, the only instrument available to the ECtHR to avoid hearing a formally admissible case was to declare it “manifestly ill-founded” pursuant to Article 35(3) of the Convention. With the entry into force of Protocol No. 14, the Court can now also refuse to hear a case if “the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”²⁰⁷ In practice, an incoming application is first allocated to lawyers in the legal division or Registry of the Court who are from the country against which the application is filed. If the application seems legitimate, it is given a case number, including the date, and the clock is stopped on the six-month deadline in Article 35(1) ECHR. The legal division may communicate with the applicant(s) to obtain additional information or documents. Once the case is complete, it is allocated to a judicial formation and

205. Kuijer, *supra* note 202, at 2-3. In particular for background information on the problem and the solution in Italy, see *Sonja Wolf, Trial Within a Reasonable Time: The Recent Reforms of the Italian Justice System in Response to the Conflict with Article 6(1) of the ECHR*, 9 EUR. PUB. L. 189-209 (2003).

206. See CEPEJ, *LENGTH OF COURT PROCEEDINGS IN THE MEMBER STATES OF THE COUNCIL OF EUROPE BASED ON THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2006) (finding the ECtHR generally held that up to two years in normal, i.e. not particularly complex cases, is a reasonable length of proceedings. However, if a case suggested urgency—often referred to as a priority case—a violation could be found even if the proceedings lasted less than two years. On the other hand, in particularly complex cases, the Court accepted proceedings of up to five years but almost never more than eight years of total duration).

207. ECHR, *supra* note 8, art. 35(3).

comes before a judge. If the legal division considers the application to be inadmissible, it is presented to a single judge. The inadmissibility decision of that judge is final pursuant to Article 27. Before the entry into force of Protocol No. 14, only a chamber of three judges had the power to declare an application inadmissible. The introduction of the single judge procedure in 2010 was the single most important change in the procedure that brought about the reduction of the backlog of cases outlined above.

Should the single judge disagree with the assessment of the legal division and consider a case admissible, she will forward it to a Committee of three judges, if the case is considered to be a “repetitive case”, or to a Chamber of seven judges, if the case is not repetitive but unique. The same happens from the outset, if the legal division considers the case admissible and, therefore, does not send it to a single judge. Although even the Committee of three and the Chamber of seven can still reverse the earlier assessment and declare a case inadmissible, this does not happen very often in practice. If the Committee or the Chamber considers that a case raises “a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous decision of the Court”,²⁰⁸ it may refer the case to the Grand Chamber of seventeen judges.

Given the fact that the Court receives more than 50,000 applications every year and is under great pressure from many sides to bring down its backlog and reduce the processing time of cases before it, the quality of the screening procedure whether a case should be admissible or not is an obvious concern. As explained above, the vast majority of these cases is declared inadmissible. With forty-seven judges on the Court, *each judge has to look at more than 1,000 cases per year to decide on the admissibility, or about five per working day*. Obviously, this comes on top of the actual work of the judges, namely to evaluate and decide those 900 or so cases that end up with a judgment every year. Given the sheer numbers, we may safely assume that the judges will rarely question the assignment of a case by the Registry to a single judge, i.e. the pre-qualification as inadmissible. This is problematic in two respects. First, the Convention itself guarantees the right of individuals to have access to court. This is generally understood as a right to be heard by an independent and impartial judge, not just an

208. See EUR. CT. H.R., YOUR APPLICATION TO THE ECHR: HOW TO APPLY AND HOW YOUR APPLICATION IS PROCESSED, http://www.echr.coe.int/Documents/Your_Application_ENG.pdf, at 5.

official in the court administration. Second, the pre-screening is done by lawyers from the state against which the application is directed. We believe that this can cause an inherent bias against the admissibility of certain types of cases. The point shall be illustrated by a case we have already described elsewhere.²⁰⁹ It provides an illustration of what are probably not infrequent casualties at the ECtHR in the quest to dispose of the enormous case load within reasonable time and by reliance on lawyers who may – consciously or not – want to spare “their” country an embarrassment or a costly conviction.

In March 2001, the new law on bailiffs entered into force in Estonia. On the one hand, this new law brought important changes to the institution of the bailiff by privatizing this former public function. On the other hand, it did not provide sufficiently detailed rules on how the bailiffs have to go about their business.²¹⁰

One of the functions of the bailiffs is to enforce financial penalties in cases of administrative offences. If the accused does not pay the fine after notification by the administration, the matter is handed over to the bailiff. The latter is obliged to notify the accused (again) and warn him or her of enforcement measures. If the fine is still not paid, the bailiff has the possibility of seizing assets of the accused in order to enforce the fine plus a fee for his or her own services. So far, this is standard procedure, common in many countries. However, the rules of procedure for the bailiffs in Estonia were not specific enough and invited abuse. In particular, it was not specified *how* the bailiff has to notify the accused of the alleged offence.²¹¹

A widely known problem demonstrates what happens when state authority is transferred to private, profit-seeking institutions without sufficiently clear rules of conduct and without proper supervision: A large number of Estonian drivers saw sums of up to EU€75 taken from their bank accounts in 2001. Those who inquired from the bank were informed that the one or the other bailiff had ordered the transfer for an unpaid parking ticket. Those who inquired from the respective bailiff were informed of the date of the alleged offence, which may have been as far back as 1999, when a general prohibition of unpaid parking in the center of Tallinn was introduced, albeit without much explanation what belonged or did not belong to the “center” of town. Supposedly,

209. See Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, 9 EUR. L.J. 288, 292-94 (2003).

210. See *id.*

211. See *id.*

the offenders should have received a notification from the police on their windshields. Later, if they did not pay, they should have received a letter from the bailiff. If they still did not pay, they should have seen a public announcement in the newspapers. Only after they ignored even that, the bailiff should have taken the money from the bank accounts. Again, in theory this sounds good. However, in practice it was quite common that drivers took parking tickets from the windshields of other cars in order to create the impression for subsequent police patrols that their car was already taken care of. Thus, the original offender may well not have received the police notice.²¹²

As far as written notification by the bailiff was concerned, this did not have to be by registered mail. Even though a simple violation of the parking rules, for example by exceeding the pre-paid time by just a few minutes, was punishable by a fine of about EU€40 – very high given the relatively low average income in Estonia at the time – the bailiffs' claimed that it would be too expensive to send even one registered letter to each offender. Interestingly, the non-registered mail seemed to get lost in literally thousands of cases, at least in part explainable by the communal mailboxes in many parts of the country, a legacy of Soviet times. That left the public announcement in the newspapers as the main source of information for the accused. However, this was organized in such a way that it was made as difficult as possible for a person to find his or her name. First of all, nobody knows when to expect such an announcement and will, thus, not specifically look for it. Secondly, the publication of hundreds of names regularly covered a whole page in what must have been about font size 4 and was not in alphabetical order. Consequently, the chances of an accused to find out about the alleged offence and defend herself or pay the original fine were marginal at best. And this is exactly what the bailiffs were interested in, since they were allowed to add about fifty percent to the fine if they had to take it directly from the bank accounts.²¹³

212. *See id.*

213. *See id.*

Although there was an obvious conflict of interest for the bailiffs between adherence to standards of due process and personal gain,²¹⁴ it was not very interesting for the victims to start court procedures for repayment of their money. First of all, the individual sums were relatively small. Secondly, the accused would never be able to prove that the bailiff did not in fact send a letter of notification and that they did not in fact receive the ticket from the police. Finally, given the very long time between the alleged violation of the parking rules and the taking of the money, they would hardly be able to prove that they might not even have been in town with their car on the respective day.²¹⁵

The “withdrawal” by the bailiffs of thousands of fines from the bank accounts of Estonian drivers was taken to court and, after exhaustion of domestic remedies, an application was filed to the ECtHR. Unfortunately, the European Court only saw that by the time it examined the case Estonia had already changed the law and that the amounts in each individual case were relatively small – although this was well before the entry into force of Protocol No. 14 and the introduction of the option of declaring a case inadmissible because the applicant(s) may not have suffered “a significant disadvantage”.²¹⁶ Thus, the case was declared manifestly ill-founded and the ECtHR missed an opportunity at explaining some fundamental principles of good administration, the non-retroactive application of sanctions, and

214. Supervision was in the hands of the Ministry of Justice, which in fact started criminal proceedings against more than 15 out of 77 Estonian bailiffs after the change of the law in 2001. See Ilona Urb, *The Reformed Institution of Bailiffs in Estonia and the Position of a Bailiff in the System of Public Administration*, Tallinn 2002, unpublished thesis, available in the library of Concordia International University Estonia, as well as interview on 28 June 2002 with Angelika Järg, in charge of supervision of the bailiffs at the Estonian Ministry of Justice.

See also AGE VÄRV, *COUNTRY REPORT ESTONIA*, EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *PILOT SCHEME FOR EVALUATING JUDICIAL SYSTEMS*, available at <https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2002Estonia.pdf>. Pursuant to this Report, 18 out of 58 Estonian bailiffs were subject to disciplinary proceedings in the year 2004 alone. This compares to 14 out of about 917 lawyers, 3 out of 189 prosecutors, and 4 proceedings against judges, although it is not clear whether these include only the 237 professional judges or also the 1785 lay judges. See, in particular, *id.* at 9 and 18-23.

215. See Emmert, *Administrative and Court Reform in Central and Eastern Europe*, *supra* note 210.

216. ECHR, *supra* note 8, art. 35(3) (as revised by Protocol No. 14).

respect for private property, for the benefit not only of the Estonian but all governments in Central and Eastern Europe and beyond.²¹⁷

4. Discouraging Applications via Low-Balling of Compensation

If an application does get examined and the Court finds a violation of the Convention or one or more of the Protocols, it cannot set aside or overrule the (final) decision(s) of the national court, it cannot remand the case to the national court for a different decision, and it cannot order the state to otherwise undo what was done to the applicant, even if that was possible in a given case. While the Contracting Parties are obligated under Art. 46(1) “to abide by the final judgment of the Court in any case to which they are parties” and this may require all kinds of reactions, including changes in law and practice, the ECtHR can only “afford just satisfaction to the injured party” pursuant to Article 41 ECHR, i.e. it can order the state to pay compensation for the violation of the victim’s rights, “if the internal law of the High Contracting Party concerned allows only partial reparation to be made.”²¹⁸

Given the fact that the judgments of the ECtHR—by contrast to the judgments of the ECJ—do *not* formally bind all Contracting Parties as *erga omnes* interpretations of the rights and obligations under the Convention,²¹⁹ and given the fact that the ECtHR does not have the power to overrule the national decisions or remand a case for a different national decision, it is surprising that the ECtHR does not take more of an interest in the issue of just satisfaction. Indeed, in *Salah v. The Netherlands*, a Chamber of seven judges held unanimously as follows:

70. Under Article 41 of the Convention, the Court may afford just satisfaction to a party injured by a violation of the Convention or its Protocols if the internal law of the High Contracting Party concerned does not allow complete reparation to be made. However, the Court is enjoined to do so only “if necessary”. Consequently, although the Court is sensitive to the effect which

217. See Emmert, *Administrative and Court Reform in Central and Eastern Europe*, *supra* note 210.

218. See EHCR, *supra* note 8, arts. 46(1) and 41.

219. See EHCR, *supra* note 8, art. 46(1) (“The High Contracting Parties undertake to abide by the final judgment of the Court *in cases to which they are parties*.” (emphasis added)).

its awards under Article 41 may have and makes use of its powers under that Article accordingly . . . *the awarding of sums of money to applicants by way of just satisfaction is not one of the Court's main duties* but is incidental to its task of ensuring the observance by States of their obligations under the Convention.²²⁰

This may explain why the ECtHR—quite possibly also in an effort at disincentivizing applications for financial gain—quite regularly affords compensation that does not even cover the legal expenses of the parties and cannot seriously be considered “just satisfaction”.²²¹ This may be a reflection of the attitude of some judges seeing their task more in the delivery of constitutional justice, rather than individual justice.²²² Indeed, the Court in *Salah v. The Netherlands* continued as follows:

71. Seen in this light, there can be no doubt of the greater importance of Article 46 of the Convention in comparison with Article 41. Under Article 46, the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties, the execution being supervised by the

220. *Salah v. The Netherlands*, No. 8196/02, EUR. CT. H.R. (2006) at ¶ 70 (emphasis added).

221. For example, in *Guincho v. Portugal*, No. 8990/80, the applicant was awarded the modern day equivalent of 750 Euros or US Dollars as compensation for a violation of Article 6(1), undue length of civil proceedings. The applicant had been injured in a car accident resulting in partial disability. His case lingered in front of the Portuguese trial court for almost four years. Half of the time was wasted on account of complete inaction of the court. Although 750 Euros was a lot more back then than it is today, we may safely assume that it barely paid for the legal and travel expenses of the applicant. In another example, *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, the Court had to deal with the systematic and persistent refusal of Mr. Luzhkov, the Mayor of Moscow, to allow gay pride parades. The ECtHR found violations of Articles 11, 13, and 14 ECHR and awarded about 4,000 Euros in non-pecuniary damages per year of the prohibition. This elicited the comment from Alexander Khinsein, a member of the Russian Parliament, that Moscow would happily pay 4,000 Euros per year for not having gay pride parades ever. See Kanstantsin Dzehtsiarou & Alan Greene, *Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners*, 12 *German L.J.* 1707, 1709 (2011). For comprehensive analysis see OCTAVIAN ICHIM, *JUST SATISFACTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 18-23, 29-42 (2015).

222. Alastair Mowbray, *Faltering Steps on the Path to Reform of the Strasbourg Enforcement System*, 7 *HUM. RTS. L. REV.* 609, 609-618 (2007) (discussing the views of former Presidents Rolv Ryssdall and Luzius Wildhaber on the one side and former President Jean-Paul Costa on the other). See also Steven Greer & Andrew Williams, *Human Rights in the Council of Europe and the EU: Toward 'Individual', 'Constitutional' or 'Institutional' Justice?*, *EUR. L.J.* 462-81 (2009).

Committee of Ministers. One of the effects of this is that where the Court finds a violation, the respondent State has a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects thereof. . . . Furthermore, under the Convention, particularly Article 1, in ratifying the Convention the Contracting States undertake to ensure that their domestic law is compatible with the Convention²²³

This is a beautiful ideal, at least in theory. The huge number of so-called “repetitive” cases shows that the practice in the Contracting Parties is quite different. Therefore, it would seem desirable for the Court to reconsider its approach to “just satisfaction”, in particular if a Contracting Party is already known for its lack of interest in terminating a systemic issue and/or in executing the Strasbourg decisions in a timely manner.

B. Criticism of the EU System of Human Rights Protection and the European Court of Justice

1. Too Much Protection? Accusations of Judicial Activism

It is a time honored tradition among various politicians and even academics in the Member States of the European Union to accuse the European Court of Justice of judicial activism, i.e. of going beyond the statutory language of the Treaties and/or the real or perceived intentions of the founding fathers.²²⁴ Although the accusation is correct, the criticism is largely misplaced.

223. *Salah v. The Netherlands*, No. 8196/02, EUR. CT. H.R. (2006) at ¶ 71.

224. *See, e.g.,* HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986); Joseph H.H. Weiler, *The Court of Justice on Trial: A Review of H. Rasmussen: On Law and Policy in the European Court of Justice*, 24 COMMON MKT. L. REV. 555, 555-89 (1987). *See also* Karen Alter, *Who Are the “Masters of the Treaty”?: European Governments and the European Court of Justice*, 52 INT’L ORG. 121, 121-147 (1998); Clifford J. Carrubba, Matthew Gabel & Charles Hankla, *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 435, 435-52 (2008); David Edward,

First, the European integration process, from the beginning, was conceived as “an ever closer union among the peoples of Europe,”²²⁵ hence a dynamic rather than a static entity. The approach to the interpretation of the Treaties taken by the European Court of Justice is neatly summarized in the following passage from the famous CILFIT decision:

(20) Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to *its state of evolution at the date on which the provision in question is to be applied*.²²⁶

Moreover, the ECJ has generally shown a willingness to fill gaps in the Treaties by reference to “general principles common to the laws of the Member States,”²²⁷ for example in the development of human rights and fundamental freedoms as inherent in the EU legal order, as outlined above. The alternative would often have been a denial of justice, if the Court had simply responded to a reference by a national judge that European law, as it stands, does not contain a provision dealing with the matter, and the individual concerned would have to

Judicial Activism – Myth or Reality?, in LEGAL REASONING AND JUDICIAL INTERPRETING OF EUROPEAN LAW: ESSAYS IN HONOUR OF LORD MACKENZIE-STUART 29-67 (1996); James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 459-89 (1995); Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. 177, 177-209 (1998); Takis Tridimas: *The Court of Justice and Judicial Activism*, 21 EUR. L. REV. 199-210 (1996); Fabio Wasserfallen: *The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union*, 17 J. EUR. PUB. POL'Y. 1128, 1128-46 (2010); Joseph H.H. Weiler, *A Quiet Revolution, The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510-34 (1994); Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986).

225. See Consolidated Version of the Treaty Establishing the European Economic Community preamble 2006 O.J. C 321 E/37, at 3 [hereinafter EC Treaty]. For the theoretical background see BEN ROSAMOND, *THEORIES OF EUROPEAN INTEGRATION* (2000).

226. Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, Case 283/81, [1982] E.C.R. 3415, at ¶ 20 (emphasis added).

227. See TFEU, *supra* note 123.

wait and see whether and when the Member States would change the Treaties to provide for the kind of case at hand.

Second, and more importantly, the dynamic interpretation of existing rules in the Treaties by the Court, and the readiness of the ECJ to develop innovative yet grounded solutions for cases where the Treaties offered none, was regularly endorsed after the fact by Treaty changes instituted by the Member States. Examples include standing of the European Parliament in proceedings before the Court²²⁸ and, of course, the entire saga of the introduction of human rights and fundamental freedoms via case law and its subsequent endorsement in the form of the European Charter. In that sense, criticism like the one hurled at the Court by Sir Patrick Neill QC is quite unfair since it lumps together all examples of “judicial activism,”²²⁹ including those that expand the powers of the European Union,²³⁰ place obligations on the Member States,²³¹ and those that actually rein in the powers of the European Union.²³²

Unfortunately, there is also the criticism that is based on a misunderstanding of EU law. For example, John Murray complained about the *Akrich* decision as being a sign “of the Court of Justice’s increasing willingness to ‘interfere,’ in the name of fundamental rights, in areas

228. Compare EEC Treaty, *supra* note 111, art. 173, with TFEU, *supra* note 123, art. 263. The Treaty change endorses decisions like the judgment of April 23, 1986, in *Les Verts v. Parliament*, Case 294/83, [1986] E.C.R. 1339; *Parliament v. Council (Chernobyl)*, Case C-70/88, [1990] E.C.R. I-204.

229. See SIR PATRICK NEILL QC, *THE EUROPEAN COURT OF JUSTICE: A CASE STUDY IN JUDICIAL ACTIVISM* (1995). See also EMMERT, *DER EUROPÄISCHE GERICHTSHOF ALS GARANT DER RECHTSGEMEINSCHAFT*, *supra* note 122, at 270-322.

230. See, e.g., *Commission of the European Communities v. Council of the European Communities*, Case 22/70 ERTA, [1971] E.C.R. 263 (establishing the principle that powers granted to the EU by the Member States in internal relations automatically create parallel powers of the EU in external relations).

231. See, e.g., *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others (Factortame I)*, Case C-213/89, [1990] E.C.R. I-2433 (requiring that English courts must have the power to grant interim relief and suspend the application of laws of parliament which might be in conflict with EU law, even if such a power was not previously granted in national law).

232. See, in particular, the case law developing EU human rights and freedoms cited above. See *supra* notes 144-160 and accompanying text.

which have traditionally been the preserve of the Member States.”²³³ Although the case, on superficial reading, concerned the right of a British national to have her non-EU spouse with her in Britain, it was by no means a so-called purely internal situation. The interference by the ECJ and the instruction to the national court to ensure respect for family life guaranteed by Article 8 of the ECHR was based on the fact that, as the national court had itself determined, the British national had exercised her right of free movement by moving to Ireland for genuine employment. Consequently, she was entitled to EU free movement rights upon return.²³⁴ Of course, if the yardstick to be applied is what has traditionally been the preserve of the Member States, there will never be a movement toward supranational human rights protection, or any movement at all.

In the end, we agree with Peter Biering who argues that the Member States have the ultimate power to rein in a runaway Court via a Treaty amendment. However, the Member States have not only never done that, they have quite regularly confirmed developments in case law by affirmative Treaty changes, in particular in the field of protection of human rights. Thus, Biering concludes “[b]y this standard, the Court of Justice has never gone *too far*.”²³⁵

2. Too Little Protection? Accusations of Denial of Justice

There are three types of scenarios where the ECJ has been accused of not going far enough in the protection of individual rights. One of these scenarios happens rather seldom and the accusation is justified. The second scenario has become quite frequent but the accusation is unjustified. The third scenario was resolved by a Treaty change, hence the Member States obligating the ECJ to go beyond where it was previously willing to go.

233. See John Murray, *Fundamental Rights in the European Community Legal Order*, 32 *FORDHAM INT'L L. J.*, 531, 548 (2009).

234. See Secretary of State for the Home Department v. Akrich, Case C-109/01, [2003] E.C.R. I-9665, at ¶ 39, 46 et seq. The Court held, in essence, that as long as the marriage and the employment are genuine, the motives for an EU citizen to work for a while in another Member State are irrelevant. The Court did acknowledge that a right under Art. 10 of Regulation 1612/68 could not be acquired if the third-country spouse was not lawfully in the EU, but fundamental rights of the EU spouse still had to be respected.

235. Peter Biering, *Has the Court of Justice Ever Taken Integration Too Far?*, in *EUROPE – THE NEW LEGAL REALISM, ESSAYS IN HONOUR OF HJALTE RASMUSSEN* 57, 79 (Henning Koch et al., ed., 2010). See also DORTE SINDBJERG MARTINSEN, *AN EVER MORE POWERFUL COURT? THE POLITICAL CONSTRAINTS OF LEGAL INTEGRATION IN THE EUROPEAN UNION* (2015).

We will briefly start with the third scenario, the right of individuals to address themselves directly to the European Court of Justice. In general, EU law is implemented by national authorities and individuals should assert their EU rights before the national courts against the acts or omissions of the national authorities. However, occasionally, an individual may claim that one or more of the EU institutions have acted or failed to act in an unlawful way and have *directly* violated the rights or financial interests of the individual, without intervention of the national authorities.

As a reminder, although the EU Member States created a supranational entity with broad legislative and even some administrative powers, they did not opt for the creation of an entire network of “federal” courts—like in the United States, for example—to directly review the application and interpretation of EU law across the Member States. Instead, the national judges and courts were co-opted to apply and enforce EU law and the normal way for an individual to bring a case against an act based on EU law is to bring it before the national courts. This is also justified by the fact that the European Union itself, for the most part, does not have administrative agencies and powers to directly apply its laws and rules in the Member States. Thus, the European Union relies on national authorities, such as customs authorities or the authorities issuing residence and work permits for migrant workers, for the implementation of its laws. Hence, it was not only cost effective to rely on the existing national judges and courts, it is also easier and cheaper for the individuals to address themselves to the national courts, which are nearby, work in the language of the Member State, and have rules and procedures with which any lawyer is familiar. The national judges, of course, had to learn how to apply EU law but they were given the option, if they were struggling with the correct interpretation of the relevant EU law or considered it potentially invalid, to bring a request for a preliminary ruling pursuant to Article 267 TFEU to the ECJ. In this way, the European Union was able to manage its affairs rather successfully with just one single federal court for over half a century.

There is one exception to the rule that cases turning on EU law have to be brought in national court, however. The European Union does have and always had some very specific administrative powers. For example, if a case has a certain magnitude and cross-border implications, antitrust supervision—the enforcement of EU competition law in EU jargon—is handled directly by the EU Commission. In such

cases, the Commission will issue decisions directly to enterprises chiding them for (potential) violations of antitrust provisions and ruling on sanctions that may include the prohibition of certain conduct and/or financial penalties up to ten percent of the annual turnover of the enterprise(s).²³⁶ Another example is the power of the Commission and the Council to issue decisions in antidumping cases. Consequently, Article 173 of the original EEC-Treaty about the review of the legality of acts of EU institutions contained the following paragraph 4:

Any natural or legal person may, under the same conditions [as apply to the institutions and the Member States], institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is *of direct and individual concern* to the former.²³⁷

The cases where a decision is addressed to an individual person or enterprise have never caused much trouble and since there are not too many of those decisions, the ECJ was able to handle the caseload reasonably well. However, the Court struggled for many years with decisions or regulatory acts that were not addressed to an individual who nevertheless felt violated in his or her rights and interests. The general approach taken by the Court was to handle the latter cases restrictively and basically ask the individuals to wait for national implementation measures and then challenge those in national court so that only a few novel problems would have to come to the ECJ via the preliminary rulings procedure. The most emblematic of these decisions was *Plaumann*.²³⁸ In 1962, in the course of the introduction of the Common Customs Tariff, the duty rate on certain citrus fruit coming into Germany was increased from ten percent to thirteen percent. Plaumann was an importer who had already committed to delivery of several shipments at a given price and was not able to pass the higher duty rate on to his clients. When Plaumann brought proceedings in Luxembourg claiming that the EU regulation was of direct and

236. An example is the recent decision by the EU Commission that Google has abused its market dominance by giving priority to its own services, such as the comparison shopping service, in the display of search results. Google was ordered to stop its illegal conduct within 90 days and pay a record fine of 2.42 billion Euros, about 2.7 billion US\$. See EU Commission, decision of 27 June 2017, Case no. 39740, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740

237. EEC Treaty, *supra* note 111, art. 173(4) (emphasis added).

238. See *Plaumann & Co. v. Commission of the European Economic Community (Plaumann)*, Case 25/62, [1963] E.C.R. 95.

individual concern to him, the Court coined the notorious “Plaumann Formula”:

(8) Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are *differentiated from all other persons* and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee.²³⁹

On the basis of this narrow interpretation of Article 173, the Court consistently refused to admit cases brought by individuals who could not show that they were in a group of one.²⁴⁰ Arguably, Plaumann could have waited for his import duty bill and then challenged that in front of the national courts but this option is not always available or satisfactory, as the following cases show.

In 2001, the Commission adopted Regulation 1162/2001 mandating larger mesh sizes for certain fishing vessels to prevent the collapse of the stock of hake.²⁴¹ Jégo-Quéré challenged the Regulation because it would have to change the nets it was using for its fishing operations. The Commission claimed that the regulation was “a measure of general application”²⁴² and that Jégo-Quéré was not individually concerned. The company, however, argued that it was not in the business of hake fishing and should have been granted an exception allowing it to carry

239. *Id.* at ¶ 8 (emphasis added).

240. See Ami Barav, *Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court*, 11 COMMON MKT. L. REV. 191, 191-98 (1974); Hjalte Rasmussen, *Why Is Article 173 Interpreted Against Private Plaintiffs?*, 5 ELREV 112 (1980).

241. See Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels, OJ 2001 L 159, at 4-9.

242. See *Jégo-Quéré et Cie SA v. Commission of the European Communities (Jégo-Quéré)*, Case T-177/01, [2002] E.C.R. II-236, ¶ 14.

nets with smaller mesh size on board of its vessels for the legitimate fishing of whiting. Specifically, Jégo-Quéré argued “that a finding that its action for annulment is inadmissible would leave it without any remedy, since no act has been adopted at national level against which legal proceedings can be brought.”²⁴³ Although the Court of First Instance did not consider Jégo-Quéré to be individually concerned,²⁴⁴ it agreed with the plaintiff that a decision of inadmissibility would leave it without a realistic remedy. Since the Court of First Instance had been specifically created to increase the European Court’s capacity to handle individual complaints, it decided to deviate from the long-standing Plaumann formula and not require that “an individual applicant seeking to challenge a general measure must be *differentiated from all others* affected by it in the same way as an addressee.”²⁴⁵ The Court of First Instance went on to rule:

in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.²⁴⁶

With its revolutionary approach, the Court of First Instance was actually following a proposal by Advocate General Jacobs in a somewhat similar case—*Unión de Pequeños Agricultores (UPA)*—pending at the same time before the Court of Justice.²⁴⁷ However, the Court of Justice did not want any of it. It rejected the arguments of AG Jacobs, claimed that it cannot be for the European Court to examine in every such case whether or not an applicant had an effective remedy in the national courts,²⁴⁸ and reaffirmed the Plaumann formula, effectively rejecting not only the proposal by AG Jacobs but also the attempt of the Court of First Instance in *Jégo-Quéré* at opening the admissibility criteria.

243. *Id.* at ¶ 21.

244. *See id.* at ¶ 38.

245. *Id.* at ¶ 49 (emphasis added).

246. *Id.* at ¶ 51.

247. *See* Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores v. Council*, Case C-50/00, [2002] E.C.R. I-6681, ¶¶ 31-103.

248. *See* *Unión de Pequeños Agricultores v. Council*, Case C-50/00, [2002] E.C.R. I-6677, ¶ 43.

However, like every good crime story, this one had a final twist. When revising the EU Treaties by way of the Treaty of Lisbon, the Member States saw it fit to change the wording of what is now Article 263(4) TFEU, the former Article 173(4) EEC, to the following:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, *and against a regulatory act which is of direct concern to them and does not entail implementing measures.*²⁴⁹

As can be seen very clearly, the Member States wanted to compel the Court of Justice to accept cases where the individual concerned does not have a realistic option of waiting for implementing measures and challenging those in the national courts. As Masters of the Treaties, they overruled the Court's restrictive interpretation of the language of the Treaty and endorsed judicial activism suggested by AG Jacobs and attempted by the Court of First Instance.²⁵⁰

Having largely resolved this issue, it remains to be seen whether the more pragmatic approach, imposing an obligation on the European Court of Justice to accept a case if it seems that the individual concerned will not find an effective remedy elsewhere, will carry over into another scenario, which is fortunately quite rare. In 1988, the Italian company Oleificio Borelli applied for a subsidy under an EU agricultural support scheme. After the Italian region of Liguria issued an unfavorable opinion on the application, the Commission issued a decision rejecting it. The company then brought proceedings in Italy against the "decision" of the region and in Luxembourg against the decision of the Commission. However, the Italian courts in effect decided that the opinion of the region could not be challenged as it was merely an internal step in the procedure, and the European Court in effect decided that the Commission's decision could not be challenged since it was bound by the unfavorable opinion of the national authorities. Oleificio Borelli was left with no effective remedy and could, presumably, take only limited consolation from the pertinent passage of the European Court's judgment:

13 . . . [i]t is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the

249. TFEU, supra note 123, art. 173(4) (emphasis added).

250. See e.g., Steve Peers & Marios Costa, *Case Note, Court of Justice of the European Union (General Chamber), Judicial Review of EU Acts After the Treaty of Lisbon*, 8 EUR. CONST. L. REV. 82, 82-104 (2012).

lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, *to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case.*

14 . . . [T]he requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. . . .

15 Since the opinion of the Member State on whose territory the project is to be carried out forms part of a procedure which leads to the adoption of a Community decision, that Member State is obliged to comply with the aforesaid requirement of judicial control.²⁵¹

The aforementioned case provides another example of a decision that is nice in theory and not quite so nice in practice.²⁵² Moreover, this is not the only case where problems have arisen regarding judicial protection of individuals caught in so-called mixed administration cases. We can only hope that the European Court, after the changes made to Article 263 TFEU by the Lisbon Treaty, will cherish the arguments of AG Jacobs presented in UPA, and agree to be the court of last resort whenever necessary.

The Plaumann scenario and the Borelli scenario have to be distinguished from purely internal situations of a single Member State, our final scenario, where the Court refuses to get involved. This time, however, the Court's reluctance is perfectly justified. An example is provided by the matter underlying the Order of December 14, 2011 in *Case C-462/11 Victor Cozman v. Teatrul Municipal Târgoviște*.²⁵³ An

251. See *Oleificio Borelli SpA v. Commission of the European Communities*, Case C-97/91, [1992] E.C.R. I-6330 (emphasis added).

252. See EMMERT, *DER EUROPÄISCHE GERICHTSHOF ALS GARANT DER RECHTS-GEMEINSCHAFT*, *supra* note 122, at 234-36.

253. See *Victor Cozman v. Teatrul Municipal Târgoviște*, Case C-426/11, [2011] ECLI:EU:C:2011:831. This is not the only case of its kind. See also, *Ministerul Administrației*

employee of a municipal theater in Romania complained to the local court against a twenty-five percent cut in his contractual salary. Since he argued, *inter alia*, that this was a violation of *the ECHR*, the Tribunalul Dâmbovița sent a preliminary reference to *the European Court of Justice* asking whether Article 1 of the First Protocol to the ECHR, the right to peaceful enjoyment of one's possessions, was violated by the salary cut. The fact that such a reference was still made to the ECJ four years after Romania's accession to the European Union sheds new light on the persistent problems in that country. Naturally, the ECJ declined to answer the question.²⁵⁴

V. SOME MODEST AND SOME NOT SO MODEST PROPOSALS FOR REFORM

The most important consideration to be remembered when talking about the strengthening of the one or the other supranational system for the protection of human rights is the principle of subsidiarity. Effective protection of human rights *always has to be provided first and foremost by the national authorities*; moreover, it has to be provided *by all three branches of government*.²⁵⁵ Existing legislation and drafts of future legislation have to be in conformity with the supranational requirements, not only with national constitutional mandates. Administrative authorities at all levels have to be required to respect the supranational guarantees of fundamental rights and freedoms, not only as they are stipulated in the respective treaties but also as they are being interpreted and developed by the respective courts. Most importantly, this requires

și Internelor (MAI) et al. v. Corpul National al Polițiștilor – Biroul Executiv Central, Case C-134/12, [2012] ECLI:EU:C:2012:288. Since the second case was sent by a different national court but with the same question *after* the ECJ issued the order in the first case, one cannot but wonder whether the Romanian judges are conspiring to bring down the preliminary reference procedure or whether they want to rub in their indifference to and ignorance of EU law.

254. Since the Charter of Fundamental Rights became binding on “the institutions and bodies of the EU . . . and the national authorities only when they are implementing EU law,” with the exception of the national authorities of the UK and Poland, both of which opted out of the binding effects of the Charter, there has been an increasing flood of such purely internal cases brought to the ECJ. See Charter of Fundamental Rights of the European Union art. 51, 2012 O.J. C 326/391, at 406, [hereinafter Charter of Rights].

255. This is reflected in Art. 1 of the ECHR: “*The High Contracting Parties* shall secure to everyone within their jurisdiction the rights and freedoms . . . of this Convention” (emphasis added). Although the Preamble of the Charter refers to both “the courts of the Union and the Member States,” EU law also follows the principle of subsidiarity by generally requiring individuals to bring their cases to the national courts who are charged with the application of EU law and will only exceptionally refer questions to the European Court of Justice about its validity and interpretation pursuant to Art. 267 TFEU.

a general awareness of the supranational standards on behalf of all national administrators, whether they are responsible for policy making at the level of the cabinet of ministers or whether they are in charge of policy implementation at the level of the police, prison service, and all other administrative units and officers that regularly interact with citizens or have the power of taking decisions that affect them. Finally, the national courts are always the first responders if something has gone wrong or somebody claims, with or without cause, that her fundamental rights have been infringed. Thus, the national judges have to be willing and able to enforce the national *and the supranational guarantees* of human rights and fundamental freedoms.

If these safeguards are in place at the level of the Member States and Contracting Parties, references to the European Court of Justice over matters of human rights as well as individual applications to the European Court of Human Rights should be quite rare and occur mainly when a situation is novel or pre-existing guarantees otherwise seem out of touch with the evolving expectations and standards of society. By contrast, if supranational institutions are regularly and repeatedly called upon to intervene in situations where the national institutions have not provided satisfactory solutions, the system is either broken or bound to break down. *The supranational institutions neither have the capacity nor the legitimacy to interfere regularly in the national legal order and do the job the national institutions are either unwilling or unable to do.* This should be kept firmly in mind, as we will now take a look at some old and some new proposals for reforms that aim at preserving and strengthening the supranational systems of the European Union and the Council of Europe.

A. Strengthening the European Convention System

The need for reforms at the European Court of Human Rights has become ever more apparent since the expansion of its membership into Central and Eastern Europe. Over the years, many official, semi-official, and private working groups have studied the options and come up with a variety of proposals. This is not the time and place to try to summarize all of their findings. However, some of the most important studies shall be named and a few of their most important proposals shall be discussed at least briefly before we will add some proposals of our own.

1. Ongoing Discussions and Existing Proposals

On the occasion of the 50th anniversary of the ECHR, a European Ministerial Conference on Human Rights was convened in Rome and adopted the Declaration *The European Convention on Human Rights at 50: What Future for the Protection of Human Rights in Europe?* In the Declaration, the Ministerial Conference:

Recalls that it falls in the first place to the member states to ensure that human rights are respected, in full implementation of their international commitments;

Calls upon all member states, to this end, to ensure constantly that their law and practice conform to the Convention and to execute the judgments of the Court;

Believes that it is indispensable, having regard to the ever-increasing number of applications, that urgent measures be taken to assist the Court in carrying out its functions and that an in-depth reflection be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation.²⁵⁶

Many well-intended official declarations and recommendations have followed. Their most important topics shall be briefly recited:

Recommendation No. R (2000) 2 on the re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights

. . . I. Invites, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

- i. the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the

256. DECLARATION, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AT 50 : WHAT FUTURE FOR THE PROTECTION OF HUMAN RIGHTS IN EUROPE ? (2000), *available at*: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/dh_gdr/Declaration-Rome_en.pdf.

just satisfaction and cannot be rectified except by re-examination or reopening, and

ii. the judgement of the Court leads to the conclusion that a. the impugned domestic decision is on the merits contrary to the Convention, or b. the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.²⁵⁷

Resolution ResDH(2001)66 States' obligation to co-operate with the European Court of Human Rights

. . . . Deploring that violations have been established in recent judgments of the European Court of Human Rights in respect of the obligation incumbent on the authorities of the Contracting States to furnish all necessary facilities to the Convention organs in their investigation with a view to establishing the facts (violations of . . . Article 38, paragraph 1.a of the Convention);²⁵⁸

Recommendation Rec(2002)13 on the publication and dissemination in the Member States of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights

. . . It is important that the governments of member states:

i. ensure that the text of the Convention, in the language(s) of the country, is published and disseminated in such a manner that it can be effectively known and that the national authorities, notably the courts, can apply it;

ii. ensure that judgments and decisions which constitute relevant case-law developments, or which require special implementation measures on their part as respondent states,

257. Committee of Ministers, *Recommendation No. R (2000) 2 on the re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights*, (Jan. 19, 2000), available at: wwwold.justice.sk/a/dwn/18/VMCS_odp_2000_02.rtf.

258. Committee on Legal Affairs and Human Rights, *Member states duty to co-operate with the European Court of Human Rights*, 2001 ResDH(2001)66. Unfortunately, the lack of cooperation on behalf of some of the Contracting Parties did not stop and the Committee of Ministers had to adopt a reminder in the form of Resolution ResDH(2006)45 States' obligation to co-operate with the European Court of Human Rights on July 4, 2006.

are rapidly and widely published, through state or private initiatives, in their entirety or at least in the form of substantial summaries or excerpts (together with appropriate references to the original texts) in the language(s) of the country, in particular in official gazettes, information bulletins from competent ministries, law journals and other media generally used by the legal community, including, where appropriate, the Internet sites;

iii. encourage where necessary the regular production of textbooks and other publications, in the language(s) of the country, in paper and/or electronic form, facilitating knowledge of the Convention system and the main case-law of the Court;

iv. publicise the Internet address of the Court's site (<http://www.echr.coe.int>), notably by ensuring that links to this site exist in the national sites commonly used for legal research;

v. ensure that the judiciary has copies of relevant case-law in paper and/or electronic form (CD-Rom, DVD, etc.), or the necessary equipment to access case-law through the Internet;

vi. ensure, where necessary, the rapid dissemination to public bodies such as courts, police authorities, prison administrations or social authorities, as well as, where appropriate, to non-state entities such as bar associations, professional associations etc., of those judgments and decisions which may be of specific relevance for their activities, where appropriate together with an explanatory note or a circular;

vii. ensure that the domestic authorities or other bodies directly involved in a specific case are rapidly informed of the Court's judgment or decision, for example by receiving copies thereof;²⁵⁹

259. Committee of Ministers, *Recommendation Rec(2002)13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights*, (Dec. 18, 2002), available at: http://www.old.justice.sk/a/dwn/18/VMCS_odp_2002_13.pdf.

Resolution Res(2002)58 on the publication and dissemination of the case-law of the European Court of Human Rights

. . . Invites the Court to review its practice as regards the publication and dissemination of its judgments and decisions. It stresses in this respect the importance for the Court that:

- i. its judgments and decisions are made available immediately in an electronic database on the Internet;
- ii. its main judgments, important decisions on admissibility and information notes on case-law are made accessible rapidly, in both paper and electronic form (CD-Rom, DVD, etc.);
- iii. it indicates rapidly and in an appropriate manner, in particular in its electronic database, the judgments and decisions which constitute significant developments of its case-law.²⁶⁰

Resolution Res(2002)59 concerning the practice in respect of friendly settlements

. . . Considering that the conclusion of a friendly settlement . . . may constitute a means of alleviating the workload of the Court, as well as a means of providing a rapid and satisfactory solution for the parties, Underlines the importance: of giving further consideration in all cases to the possibilities of concluding friendly settlements and, if any such friendly settlement is concluded, of ensuring that its terms are duly fulfilled.²⁶¹

Resolution res(2004)3 on judgments revealing an underlying systemic problem

. . . Invites the Court:

260. Committee of Ministers, *Resolution Res(2002)58 on the publication and dissemination of the case-law of the European Court of Human Rights*, (Dec. 18, 2002), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090-00016804ddd60.

261. Committee of Ministers, *Resolution Res(2002)59 concerning the practice in respect of friendly settlements*, (Dec. 18, 2002), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804de98a.

I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;

II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court.²⁶²

Recommendation Rec(2004)4 on the European Convention on Human Rights in university education and professional training

... Recommends that member states:

I. ascertain that adequate university education and professional training concerning the Convention and the case-law of the Court exist at national level and that such education and training are included, in particular: as a component of the common core curriculum of law and, as appropriate, political and administrative science degrees and, in addition, that they are offered as optional disciplines to those who wish to specialise; as a component of the preparation programmes of national or local examinations for access to the various legal professions and of the initial and continuous training provided to judges, prosecutors and lawyers; in the initial and continuous professional training offered to personnel in other sectors responsible for law enforcement and/or to personnel dealing with persons deprived of their

262. Committee of Ministers, *Resolution Res(2004)3 on judgments revealing an underlying systemic problem*, (May 12, 2004), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dd128.

liberty (for example, members of the police and the security forces, the personnel of penitentiary institutions and that of hospitals), as well as to personnel of immigration services, in a manner that takes account of their specific needs,²⁶³

Recommendation Rec(2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights

. . . Recommends that member states, taking into account the examples of good practice appearing in the appendix:

I. ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case-law of the Court;

II. ensure that there are such mechanisms for verifying, whenever necessary, the compatibility of existing laws and administrative practice, including as expressed in regulations, orders and circulars;

III. ensure the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention,²⁶⁴

Recommendation Rec(2004)6 on the improvement of domestic remedies

. . . Recommends that member states, taking into account the examples of good practice appearing in the appendix:

I. ascertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and

263. Committee of Ministers, *Recommendation Rec(2004)4 on the European Convention on Human Rights in university education and professional training*, (May 12, 2004), available at: [http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/20CommitteeofMinistersRecommendationRec\(2004\)4tomemberstatesontheEuropeanConventiononHumanRightsinuniversityeducationandpro.aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/20CommitteeofMinistersRecommendationRec(2004)4tomemberstatesontheEuropeanConventiononHumanRightsinuniversityeducationandpro.aspx).

264. Committee of Ministers, *Recommendation Rec(2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights*, (May 12, 2004), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dd194.

that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found;

II. review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court;

III. pay particular attention, in respect of aforementioned items I and II, to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings;²⁶⁵

Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights

... RECOMMENDS that member states:

1. designate a co-ordinator – individual or body – of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process. This co-ordinator should have the necessary powers and authority to: acquire relevant information; liaise with persons or bodies responsible at the national level for deciding on the measures necessary to execute the judgment; and if need be, take or initiate relevant measures to accelerate the execution process;
2. ensure, whether through their Permanent Representation or otherwise, the existence of appropriate mechanisms for effective dialogue and transmission of relevant information between the co-ordinator and the Committee of Ministers;
3. take the necessary steps to ensure that all judgments to be executed, as well as all relevant decisions and resolutions of the Committee of Ministers related to those judgments, are duly and rapidly disseminated, where necessary in translation, to relevant actors in the execution process;

265. Committee of Ministers, *Recommendation Rec(2004)6 on the improvement of domestic remedies*, (May 12, 2004), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dd18e.

4. identify as early as possible the measures which may be required in order to ensure rapid execution;
5. facilitate the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level either generally or in response to a specific judgment, and to identify their respective competences;
6. rapidly prepare, where appropriate, action plans on the measures envisaged to execute judgments, if possible including an indicative timetable;
7. take the necessary steps to ensure that relevant actors in the execution process are sufficiently acquainted with the Court's case law as well as with the relevant Committee of Ministers' recommendations and practice;
8. disseminate the vademecum prepared by the Council of Europe on the execution process to relevant actors and encourage its use, as well as that of the database of the Council of Europe with information on the state of execution in all cases pending before the Committee of Ministers;
9. as appropriate, keep their parliaments informed of the situation concerning execution of judgments and the measures being taken in this regard;
10. where required by a significant persistent problem in the execution process, ensure that all necessary remedial action be taken at high level, political if need be.²⁶⁶

Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings

. . . Recommends that the governments of the member states:

1. take all necessary steps to ensure that all stages of domestic proceedings, irrespective of their domestic characterisation, in which there may be determination of civil rights

266. Committee of Ministers, *Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights*, (Feb. 6, 2008), available at: www.wold.justice.sk/a/dwn/18/VMCS_odp_2008_02.rtf.

and obligations or of any criminal charge, are determined within a reasonable time;

2. to this end, ensure that mechanisms exist to identify proceedings that risk becoming excessively lengthy as well as the underlying causes, with a view also to preventing future violations of Article 6;

3. recognise that when an underlying systemic problem is causing excessive length of proceedings, measures are required to address this problem, as well as its effects in individual cases;

4. ensure that there are means to expedite proceedings that risk becoming excessively lengthy in order to prevent them from becoming so;

5. take all necessary steps to ensure that effective remedies before national authorities exist for all arguable claims of violation of the right to trial within a reasonable time;

6. ascertain that such remedies exist in respect of all stages of proceedings in which there may be determination of civil rights and obligations or of any criminal charge;

7. to this end, where proceedings have become excessively lengthy, ensure that the violation is acknowledged either expressly or in substance and that: a. the proceedings are expedited, where possible; or b. redress is afforded to the victims for any disadvantage they have suffered; or, preferably, c. allowance is made for a combination of the two measures;

8. ensure that requests for expediting proceedings or affording redress will be dealt with rapidly by the competent authority and that they represent an effective, adequate and accessible remedy;

9. ensure that amounts of compensation that may be awarded are reasonable and compatible with the case law of the Court and recognise, in this context, a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage;

10. consider providing for specific forms of non-monetary redress, such as reduction of sanctions or discontinuance of proceedings, as appropriate, in criminal or administrative proceedings that have been excessively lengthy;

11. where appropriate, provide for the retroactivity of new measures taken to address the problem of excessive length of proceedings, so that applications pending before the Court may be resolved at national level;

12. take inspiration and guidance from the Guide to Good Practice accompanying this recommendation when implementing its provisions and, to this end, ensure that the text of this recommendation and of the Guide to Good Practice, where necessary in the language(s) of the country, is published and disseminated in such a manner that it can be effectively known and that the national authorities can take account of it.²⁶⁷

Resolution CM/Res(2010)25 on member states' duty to respect and protect the right of individual application to the European Court of Human Rights

... Calls upon the States Parties to:

1. refrain from putting pressure on applicants or persons who have indicated an intention to apply to the Court, members of their families, their lawyers and other representatives and witnesses aimed at deterring applications to the Court, having applications which have already been submitted withdrawn or having proceedings before the Court not pursued;

2. fulfil their positive obligations to protect applicants or persons who have indicated an intention to apply to the Court, members of their families, their lawyers and other representatives and witnesses from reprisals by individuals or groups including, where appropriate, by allowing applicants and witnesses to participate in witness protection programmes and providing appropriate forms of effective protection, including at international level; ...

4. identify and appropriately investigate all cases of alleged interference with the right of individual application ... ;

267. Committee of Ministers, *Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings*, (Feb. 24, 2010), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf8e9.

5. take any appropriate further action, in accordance with domestic law, against persons suspected of being the perpetrators and instigators of such interference, including, where justified, by seeking their prosecution and the punishment of those found guilty;

6. if they have not already done so, ratify the 1996 European Agreement relating to persons participating in proceedings of the European Court of Human Rights . . .²⁶⁸

When reviewing the central issues addressed in these documents, one cannot but admit that virtually every problem in the effective implementation of the ECHR in the Contracting Parties has already been addressed. Many of them were also summarized in the Report of the Group of Wise Persons to the Committee of Ministers of November 15, 2016 about an overall strategy to ensure the long-term effectiveness of the Convention.²⁶⁹ The question to be answered is why the caseload continues to grow and why even the number of repetitive cases is not in serious decline. More importantly, one has to wonder why even long-standing problems with the execution of judgments of the ECtHR continue to persist. How can it be that the share of judgments that have not been executed within five years has grown from twenty percent in 2011 to fifty-five percent in 2015?²⁷⁰ Possibly out of a certain degree of disillusionment with the effectiveness—or rather lack thereof—of the many beautiful resolutions and declarations, the Council of Europe has more recently pursued a different approach. In response to the Brighton Declaration of April 20, 2012 on the Future of the European

268. Committee of Ministers, *Resolution CM/Res(2010)25 on member states' duty to respect and protect the right of individual application to the European Court of Human Rights*, (Nov. 10, 2010), available at: http://www.vj.mee/sites/default/files/content-editors/Res_2010_25_eng.pdf. The reader could be forgiven for asking why it is not in any case required for a state wishing to join the Council of Europe not only to ratify the ECHR but also the 1996 Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights.

269. See REPORT TO THE GROUP OF WISE PERSONS TO THE COMMITTEE OF MINISTERS CM(2006)203, (Nov. 15, 2006), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d7893.

270. See COMMITTEE OF MINISTERS, 9TH ANNUAL REPORT OF THE COMMITTEE OF MINISTERS ON THE SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS 10 (2015), available at: <https://rm.coe.int/168062fe2d>.

Court of Human Rights,²⁷¹ the Steering Committee for Human Rights (“CDDH”) was charged with the compilation of a report on The Longer-Term Future of the System of the European Convention on Human Rights. In this report the CDDH gathered and discussed a wide range of measures already taken or newly proposed. Some of the discussion points may be surprising, for example that the CDDH considered it necessary to remind the Contracting Parties that they “have undertaken to abide by final judgments of the Court to which they are parties.”²⁷² However, the truth is that “[i]nadequate national implementation of the Convention remains among the principal challenges or is even the biggest challenge confronting the Convention system.”²⁷³ The CDDH Report identified a number of reasons, why this remains such a challenge:

- The Court’s case law is “voluminous” and “subject to constant enrichment,”²⁷⁴

a reference to the problem of signal and noise and the importance for the Court of signaling clearly which decisions are the most important and should make it into textbooks and university curricula.

- Effective implementation of European human rights at the national level requires “effective involvement of and interaction between a wide range of actors (members of government, parliamentarians, and the judiciary as well as national human rights institutions, civil society and representatives of the legal professions)”²⁷⁵

To this we should absolutely add the other members of the public administration who interact with citizens, in particular but not limited to the law enforcement agencies! As we have already postulated in 2012:

Human rights and fundamental freedoms will not be effectively guaranteed until every person who is potentially going to be a victim or a perpetrator has been educated about his or her rights and obligations. Just like every person has to have a basic sense of

271. See EUR. CT. HUM. RTS., HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS (Apr. 20, 2012), http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

272. See STEERING COMMITTEE REPORT, *supra* note 197, at ¶ 24 (with a reference to Art. 46 of the Convention).

273. STEERING COMMITTEE REPORT, at ¶ 34.

274. *Id.* at ¶ 36

275. *Id.* at ¶ 35

what is required and what is prohibited under the laws on crimes and misdemeanors, and just like every person needs to understand the basic traffic rules, each Member State should educate the public at large about human rights and the guarantees provided by the ECHR. This does not require sending every person into law school courses. Short TV spots, along the lines of public interest commercials, and other forms of information dissemination, can already make a big difference. More importantly, government officials who are not legally trained but part of law enforcement, in particular prison wardens and police officers, have to receive systematic training on (European) human rights and fundamental freedoms. Model codes of conduct, best practice standards, and similar tools for these professionals would also help if made available in the respective languages and endorsed either by the governments themselves or by the relevant professional organizations. Every problem that can be avoided at the level of these professionals will already not burden the domestic, let alone the international judicial review procedures. . . . [T]he lack of suitable CLE requirements and the absence or insufficiency of training opportunities for private practitioners not only contributes to the poor record of these countries in the application of the ECHR, which in turn is reflected both in the high number of cases going to Strasbourg, the relatively high percentage of judgments finding a violation, and the serious problems these countries seem to have with the execution of the judgments of the EuCtHR. . . . *Where a significant percentage of practitioners are regularly providing mediocre legal services and/or are unable or unwilling to keep up to date about developments on the international level with relevance to their area(s) of practice, the rule of law is compromised at its core.*²⁷⁶

Above all, effective implementation at the national level also requires the availability of the Court's case law in the official languages of the Contracting Parties. The limitation of the Council of Europe's working languages to English and French seemed like a stroke of genius when the official languages of the European Union proliferated to twenty-four in the wake of the Eastern European enlargements.

276. See Frank Emmert, *The Implementation of the European Convention on Human Rights and Fundamental Freedoms in New Member States of the Council of Europe – Conclusions Drawn and Lessons Learned*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN CENTRAL AND EASTERN EUROPE* 597, 609-12 (Leonard Hammer & Frank Emmert, eds., 2012), [hereinafter Emmert, *Implementation*] (emphasis added) (footnotes omitted).

However, as Ole Due, then President of the European Court of Justice in Luxembourg, pointed out to us many years ago, one can't very well tell individuals and government officials in the member states that they are bound by supranational judgments and other supranational rules if one does not even have them available in their respective languages. Thus, we already noted in 2012 that the decisions of the ECtHR— at least to the extent that they are not just dealing with repetitive cases— need to be translated systematically into all official languages of the Contracting Parties.²⁷⁷ To be fair, the Council of Europe has made significant progress in this direction. At least some of the case law is nowadays available also in Albanian, Arabic, Armenian, Azerbaijani, Bulgarian, Chinese, Czech, Hungarian, Italian, Macedonian, Polish, Russian, Turkish, and Ukrainian.²⁷⁸ Given its resource constraints, the Court has focused on translations into languages where problems exist and persist. Thus, for example, the first and so far only case law guide available in Italian deals with the right to a fair trial in criminal cases.

– To prevent human rights violations from happening in the first place, it is important to start with existing and new legislation and to ensure its compatibility with Convention standards.²⁷⁹ The CDDH specifically encourages that parliamentary committees or sub-committees are formed for the assessment of conformity of draft legislation and that reports by these committees should be required before a draft can go to the full parliament for a vote.

We agree that all Contracting Parties should have parliamentary commissions or, even better, joint commissions composed of members of the legislative, executive and judicial powers, to oversee and sign off on the ECHR compatibility of all draft legislation before it is finalized and voted on by parliament. Ideally, the commissions would also work backward and identify problems in existing legislation, in particular after decisions by the ECtHR mandate a new understanding of a particular right or freedom in the ever evolving European system. In this regard, Contracting Parties need to be encouraged to look at the entire body of case law of the ECtHR, not only their own cases. Furthermore, primacy clauses along the lines of the example in the next section could also be inserted in key national laws, such as the criminal

277. *Id.*, at 609.

278. See generally *Case Law Analysis*, EUR. CT. HUM. RTS. http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n1347528850996_pointer. Information for persons wishing to apply to the Court is provided in a total of 36 languages.

279. STEERING COMMITTEE REPORT, *supra* note 197, at ¶¶ 52-57.

code, the code on criminal procedure, the administrative procedure code, the law on courts, laws dealing with police powers and national security, as well as substantive norms like the media law, the law on political parties, etc. to remind not only those applying the law but also those subjected to it of the ECHR guarantees. All of this makes eminent sense and it remains a mystery why so few of the Contracting Parties are taking up these suggestions since it would seem to be in their best interest at least to know if and when a conflict with Convention standards might exist.

The CDDH contemplated whether to recommend the creation of “new domestic remedies provided by a special judicial organ or a special chamber dealing exclusively with Convention matters.”²⁸⁰ The idea here is a kind of national filter mechanism doing what would otherwise be requested of the ECtHR. In the end, the CDDH decided to leave it up to the Contracting Parties which remedies or combination of remedies they want to provide.²⁸¹ The CDDH shows a lot of deference here, specifically stating “that the Contracting Parties are afforded a margin of discretion in conforming to their obligations under Article 13 [the right to an effective remedy]”.²⁸² The unfortunate reality is, however, that too many of the Contracting Parties have become quite comfortable with *not* conforming to their obligations! Therefore, we would argue that the time for extensive deference is over and that Contracting Parties generating a disproportionate number of admissible and meritorious complaints have to implement one or more of a range of measures to address their evident problems.

2. Some Additional Proposals for Consideration

Already in 2012, we strongly endorsed the idea that the Contracting Parties should insert a supportive clause in their respective constitutions and that such insertion should in fact be required from a country that wishes to join the Council of Europe.²⁸³ Of course, this

280. STEERING COMMITTEE REPORT, *supra* note 197, at ¶ 66.

281. *Id.*

282. *Id.* at ¶ 67 (footnotes omitted).

283. See Emmert, *Implementation*, *supra* note 278, at 601-04. The Council of Europe, in particular its Parliamentary Assembly, did apply a flexible approach and did provide different

should have become mandatory before the CEECs were admitted²⁸⁴ and one could argue that we are trying to close the barn door after the horses have bolted. However, if the one or the other country were willing to insert something along the following lines when next updating their constitution, nothing would be lost and much could be gained:

All branches of government, including the legislature, executive, and judiciary, are committed to the protection of human rights and fundamental freedoms pursuant to the standards enshrined in the European Convention on Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights.²⁸⁵ In case national guarantees differ from European standards, the most advantageous interpretation for the individual shall prevail.

The legislature shall review existing legislation to ensure conformity with European standards for the protection of human rights and fundamental freedoms and shall refrain from adopting new legislation that falls short of these guarantees.

The executive branch, on all levels, shall protect and promote human rights and fundamental freedoms at all times. Derogations shall be permitted only to the extent necessary in a democratic society, conforming to the principle of proportionality, and otherwise in conformity with the European Convention and the case law of the European Court of Human Rights.

The judiciary, including all courts on all levels and all proceedings, shall oversee and enforce respect of human rights and fundamental freedoms pursuant to these standards both by the other branches of government and by private parties against each other. The

Member States with different accession requirements. For example, Moldova was told to amend its constitution within a year of accession to guarantee judicial independence. See, STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS - ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 108 (2006). Therefore, the present proposal would not seem outside of the powers and possibilities of the Council.

284. The only European countries currently not yet in the system of the Council of Europe and the Convention are Belarus and Kosovo.

285. See generally, Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 J. GLOBAL CONSTITUTIONALISM 53, 53-90 (2012) (promoting a similar obligation as a central pillar of his appeal).

judiciary is firmly committed to providing adequate remedies against possible infringements of human rights and fundamental freedoms on the national level to eliminate, as much as possible, the need of parties to call upon the European Court of Human Rights.²⁸⁶

Even if a Contracting Party cannot be moved to insert such a clause into its constitution, it may be possible to insert more limited clauses into specific laws, such as the criminal code, the code on criminal procedure, etc. as suggested above. The Council of Europe could support such efforts with model clauses or, even better, entire model laws for modern and human rights compatible laws dealing with police powers and national security, prison services, political parties and other civil society associations, the internet and the media, etc.

To the extent the legislative branches are not willing or able to provide clear endorsements for the ECHR, much the same results could still be achieved if national supreme or constitutional courts would commit to systematically squashing and remanding lower court decisions that fall short of the standards of the ECHR as interpreted in the case law of the ECtHR. On the basis of the ratification and direct effect of the ECHR, most supreme or constitutional courts of the Member States would have the power to do just this. The question remains whether they have the willingness and the technical skills as well.

To give but one example, Article 90 of the Turkish Constitution stipulates that “[i]n the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”²⁸⁷ On this basis, the Constitutional Court has held that provisions of Turkish law openly in conflict with the ECHR cannot be applied any more, they “have been implicitly repealed”.²⁸⁸ Against this background, it is not surprising that President Erdogan, after the real or staged coup attempt of July 15, 2016, went specifically after judges he

286. See Emmert, *Implementation*, *supra* note 276, at 602-03.

287. Constitution of Turkey, Chapter D. Ratification of International Treaties, Article 90(4), as last amended on May 22, 2004.

288. See the decisions of the Turkish Constitutional Court in B. No. 2013/2187, 19/12/2013, ¶¶ 45-46; Application No. 2013/4439, 6/3/2014, *cited in* YAMAN AKDENİZ & KEREM ALTIPARMAK, EUROPEAN COURT OF HUMAN RIGHTS JUDGMENT IN THE CASE OF ARTUN AND GÜVENER V. TURKEY, MONITORING REPORT FOR IHOP HUMAN RIGHTS JOINT PLATFORM (Dec. 2016).

considered inconvenient or disloyal. The fallout from Erdogan's increasingly totalitarian rule has yet to hit the Convention organs in Strasbourg.

Another thing the suggested constitutional amendment would clarify is the *erga omnes* nature of decisions of the ECtHR. This is currently widely under-appreciated. To the extent the Contracting Parties have commissions to review national laws for ECHR compatibility and to the extent they require continuing education of lawyers, judges, and administrative officials in matters related to human rights, they tend to focus on judgments of the ECtHR handed down *against their own state* and ignore cases against other countries that are just as important, if not more, for the correct interpretation of the ECHR and the evolution of human rights protection in Europe.²⁸⁹ The justification for this myopic approach is the general mantra that ECtHR judgments—by contrast to the decisions of the ECJ in the preliminary ruling procedure—do *not* have *erga omnes* effect. Thus, as the CDDH not only admits but also supports, the Contracting Parties are under no obligation “to abide by final judgments of the Court in cases to which they are not parties.”²⁹⁰ We would argue, however, that a statement as this one should never stand alone since it encourages the widespread practice by all three branches of government in many Contracting Parties to ignore any and all decisions of the ECtHR except the ones directly addressed to the respective country. While it is true that the Contracting Parties only “undertake to abide by the final judgment of the Court in any case *to which they are parties*,”²⁹¹ hence are not formally bound by the other judgments, they have also promised to “secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention.”²⁹² Since the rights and freedoms in the ECHR cannot be understood without reference to the case law of the ECtHR, the Contracting Parties cannot possibly fulfill their obligations without a deep level of understanding of and engagement with *all important judgments* of the ECtHR. The former Vice-President of the

289. *See generally* STEERING COMMITTEE REPORT, *supra* note 197, at ¶ 24.

290. *See id.* at ¶ 64.

291. ECHR, *supra* note 8, art. 46(1) (emphasis added).

292. *Id.*, art. 1.

ECtHR, Judge Zupančič explained the binding effect of the judgments of the Court as follows:

The interpretation of a judgment of the European Court of Human Rights is no different from the interpretation of any other precedent judgment delivered by any other court. In the last analysis, the only difference obtains from the *perception* of the binding nature of the superior court judgments.²⁹³ ...

Because the judges of the lower courts know that the judgments of the higher courts are at least *de facto* binding on them, these judges ... read and interpret judgments delivered by the higher (supreme and constitutional) courts. They know that effectively their independence *vis-à-vis* the higher courts is an ideological fiction. If they did not believe this, they would be reversed over and over again.²⁹⁴

The large number of so-called repetitive applications, even from the same Contracting Parties, are a stark reminder that the ECtHR is not sufficiently perceived by the national judges as a superior court issuing important precedents they should better take into account, lest they be reversed over and over again. Arguably, the ECtHR, in spite of serious resource constraints, had done its share in signaling to the national judges the important judgments, in particular by allocating these cases to the Grand Chamber. Also, as mentioned earlier, the Court has been producing translations of important cases into a number of additional languages and provides links to external sites and organizations for additional language versions.²⁹⁵ The ball is, therefore, largely in the court of the Contracting Parties.²⁹⁶ They have to do more to signal to their judges—and ultimately their civil servants in all three branches of government—that knowledge of and compliance with the ECHR matters, not least for those who want to be promoted and/or enjoy other benefits in the future. And they have to provide their judges

293. Boštjan M. Zupančič, *Chapter 12: On the Interpretation of Legal Precedents and of the Judgments of the European Court of Human Rights*, § 3.3: *The Erga Omnes Effect of ECHR Law*, in *THE OWL OF MINERVA* 380 (2008) (emphasis added).

294. *Id.* (emphasis in original). See also the language used by the Court itself in *Ireland v. United Kingdom* (1978), above note 62 and accompanying text.

295. See EUR. CT. HUM. RTS., CASE-LAW: LANGUAGE VERSIONS (2017), available at: http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC/translations#n1357202442922_pointer.

296. The CDDH Report also contains a number of suggestions how the Contracting Parties should improve national compliance. See STEERING COMMITTEE REPORT, *supra* note 197, at 30-42 and 73-87. Unfortunately, the language is sometimes too reserved, given the urgency of the matter.

and other civil servants with the training and other tools to enable them to implement *all* human rights guarantees under the Convention *as interpreted by the ECtHR* in their daily work *every time* an issue comes up where a conflict between the ECHR and national law or practice might arise.

B. Strengthening the EU System

Since the EU is not primarily perceived as a guardian of human rights and fundamental freedoms and the European Court of Justice has been better able to control its case load and the procedural delays, there are far fewer proposals on EU human rights protection reform. We don't know whether the founding fathers who came up with the preliminary ruling procedure fully understood the powerful tool they handed to the ECJ but the combination of co-opting the national judges as agents of EU law and of giving the decisions of the ECJ erga omnes effect is quite probably the single most important secret of success of the European Union and its legal system. The primary deficiency of the EU in the realm of human rights protection, the lack of a catalog or bill of rights, has been corrected, first via the practice of the ECJ and more recently by the adoption of the European Charter. This leaves us only two points for the final part of this analysis: Should the EU still accede to the ECHR as well? And should the European Charter, regardless of the answer to the first question, become the bill of rights not only of the EU but also for the Member States in all their acts and omissions?

1. Accession to the European Convention on Human Rights and Fundamental Freedoms?

The idea of EU accession to the ECHR has been around for decades. At first, it did not seem possible, since only Contracting States of the Council of Europe were entitled to ratify the ECHR. However, at least since the entry into force of Protocol No. 14 to the ECHR on June 1, 2010, and with it the addition of a new paragraph 2 to Article 59, “[t]he European Union may accede to this Convention.” The idea also seems to be supported by the Member States of the European Union. Not only did the Member States endorse the case law of the ECJ by including Article 6(3) in the Treaty on European Union pursuant to which:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms

and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.²⁹⁷

They also wrote specifically in Article 6(2) TEU that “[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. . . .”²⁹⁸

As a consequence, it has been said that pretty much everyone agrees that the European Union should accede to the ECHR. Well, not quite everyone.²⁹⁹ The European Court of Justice, for one, did not agree. When the EU Commission made use of the procedure outlined in Article 218(11) TFEU and asked the ECJ whether accession of the EU to the ECHR would be compatible with the EU Treaties, the Full Court, in its Opinion 2/13 of 18 December 2014, decided as follows:

157. As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65).

158. The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR. . . .

297. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [hereinafter Treaty of Amsterdam].

298. *Id.*, art. 6(2).

299. See Defeis, *supra* note 114. See also PAUL GRAGL, THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2013); Francis G. Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union Accession to the European Convention on Human Rights*, in THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 291 (Ingolf Pernice, Juliane Kokott, & Cheryl Saunders eds., 2006); Xavier Groussot & Eric Stavelfeldt, *Accession of the EU to the ECHR: A Legally Complex Situation*, in HUMAN RIGHTS IN CONTEMPORARY EUROPEAN LAW, SWEDISH STUDIES IN EUROPEAN LAW, VOL. 6, (Joakim Nergelius & Eleonor Kristoffersson eds., 2015).

167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’.

168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (see judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41; *Kremzow*, C-299/95, EU:C:1997:254, paragraph 14; *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 73; and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 283 and 284).

170. The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU (see, to that effect, judgments in *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 4, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 281 to 285).

171. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 21). ...

174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in *van Gend & Loos*, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83).

177. Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above. . . .

182. The Court of Justice has . . . already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinions 1/91, EU:C:1991:490, paragraphs 40 and 70, and 1/09, EU:C:2011: 123, paragraph 74).

183. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order (see Opinions 1/00, EU:C:2002:231, paragraphs 21, 23 and 26, and 1/09, EU:C:2011:123, paragraph 76; see also, to that effect, judgment in

Kadi and Al Barakaat International Foundation v Council and Commission, EU:C:2008:461, paragraph 282).

184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law (see Opinions 1/91, EU:C:1991:490, paragraphs 30 to 35, and 1/00, EU:C:2002:231, paragraph 13).³⁰⁰

Ultimately, the ECJ concluded that the EU could *not* accede to the ECHR because oversight by the ECtHR would be “liable to adversely affect the specific characteristics of EU law and its autonomy”,³⁰¹ would be “liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law”³⁰² and finally “would be liable to interfere with the division of powers between the EU and its Member States.”³⁰³ And while the European Court could be accused of having a bit of a personal interest in the matter, since it was clearly not eager to see its decisions “appealed” to the Strasbourg Court, it is not at all obvious what the added value of an accession to the ECHR would be.

First, the human rights guarantees under the Charter generally go further in substance than the guarantees under the much older Convention, even when the evolution of the Convention via the case law of the ECtHR is taken into account. Thus, it is certainly not impossible but still quite unlikely that Convention oversight of the EU would provide *substantially better* human rights protection in any given case. The main situations where differences would play out are likely to be the highly contentious and open ended debates in modern societies, such as the conflict between pro-life and pro-choice proponents in the debate over abortion or the conflict between those who want to prioritize security over privacy in the war on terror and those who seek to safeguard a larger measure of privacy even if it comes at a cost to security. In the end, the differences would be the (personal) judgment of a group of judges in Strasbourg versus the (personal) judgment of a

300. Opinion of the Court (Full Court) of 18 December 2014, Opinion pursuant to Article 218(11) TFEU, Case Opinion 2/13, [2014], ECLI:EU:C:2014:2454.

301. *Id.* at ¶ 200.

302. *Id.* at ¶ 212.

303. *Id.* at ¶ 225.

group of judges in Luxembourg in a case that does not have clear legal guidelines one way or another.

Moreover, any additional benefit one might gain from ECtHR oversight would come at steep cost: The procedure in the ECJ already takes about two years, and that is after any preliminary procedures before the Commission or in the national courts. An “appeal” to the ECtHR would add several more years to the overall duration of the dispute and we may safely assume that parties who are willing and able to take a case all the way to Luxembourg would not stop there if another level of review was (potentially) available in Strasbourg. Therefore, many of the crucial and open-ended decisions of the European Court of Justice would be “appealed” to the European Court of Human Rights and further clog up the system there. Last but not least, if it is true that the most important cases would be the open ended value decisions, it is not at all clear that human rights would ultimately be better protected in a court where a significant number of judges are from Eastern and South Eastern Europe, hence from countries where respect for the rule of law, freedom, democracy, and human rights is still not always secured at a level comparable to the EU.

Even without a formal ratification of the ECHR by the European Union, the ECtHR has some ways and means, albeit limited, to oversee activities of the European Union. This was illustrated in the *Bosphorus* decision of the ECtHR of June 30, 2005.³⁰⁴ The applicant, Bosphorus Hava Yollari Turizm, a Turkish charter airline company, had leased several aircraft from Yugoslav Airlines right before the UN adopted and the European Union implemented sanctions against the Federal Republic of Yugoslavia in 1991. In May 1993, one of the aircraft was sent to Ireland for maintenance and was impounded pursuant to EU Regulation 990/93 Concerning Trade Between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro).³⁰⁵ Legal remedies in the Irish courts and in the European

304. Judgment of the ECtHR (Grand Chamber) of 30 June 2005 in the Case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98.

305. OJ 1993 L 102, at 14.

Court of Justice³⁰⁶ were unsuccessful and the airline finally brought the case to Strasbourg. Although the case was brought against Ireland, it was clear that Ireland had merely acted upon instructions from the European Union. In a brief submitted to the ECtHR, the EU Commission argued that Ireland had no discretion in the matter and should not be held responsible for an EU act and that EU acts themselves should not be reviewed as long as the European Union had not acceded to the ECHR.³⁰⁷ The European Court of Human Rights disagreed, however, and held that Ireland was responsible for acts of the Irish Minister of Transport even if the latter acted in the implementation of EU law and without discretion of his own.³⁰⁸ Ultimately, the ECtHR crafted a highly differentiated approach:

151. The question is therefore whether, and if so to what extent, that important general interest of compliance with Community obligations can justify the impugned interference by the Irish State with the applicant company's property rights.

152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention

154. In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its

306. *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications*, Case C-84/95, [1996] E.C.R. I-3953.

307. Judgment of the ECtHR (Grand Chamber) of 30 June 2005 in the Case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, ¶ 122.

308. *Id.* at ¶¶ 137 and 148.

sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its preemptory character and undermining the practical and effective nature of its safeguards The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention

155. In the Court's view, State action taken in compliance with such legal obligations is justified *as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides* However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights³⁰⁹

The careful reader will not only smile at the recurrence of the famous "so long as" formula of the German Constitutional Court³¹⁰ in para. 155 of the present judgment. She will also note that the ECtHR relies not only on the general level of protection provided by the European Union but also mandates a safeguard for the particular case.³¹¹

Given the fact that the vast majority of EU law is made operational via legislative and administrative acts of the Member States, as outlined

309. *Id.* at ¶¶ 151-56 (emphasis added).

310. *See supra* notes 143 and 153 and accompanying text.

311. *See id.* at ¶ 156.

above, this decision is potentially far reaching, even if the ECtHR did ultimately not find a violation of the property rights of the airline either.

In conclusion, we suggest that a systematic oversight by the European Court of Human Rights over the institutions of the EU is unnecessary and would do more harm than good. Already, the ECtHR is able to pull the emergency break via oversight of the Member States in their implementation of EU law, should any real deficits in the protection of human rights emerge at the EU level.

2. Application of the Charter to All Acts of the Member States?

The European Charter is not only a reflection of the shared values of the entire European Union, hence transcends the more particular values of the individual Member States. As a very recent codification, it is also distinctly modern, even progressive, at least for the most part. Article 8, Protection of Personal Data; Article 13, Freedom of Arts and Sciences; Article 14, Right to Education; Article 16, Freedom to Conduct a Business; Article 18, Right to Asylum; Article 24, Rights of the Child; Article 25, Rights of the Elderly; Article 31, Fair and Just Working Conditions; Article 34, Social Security and Social Assistance; Article 35, Health Care; Article 37, Environmental Protection; as well as Article 38, Consumer Protection, are guarantees one does not always find in national constitutions of the European Member States and certainly not in older bills of rights like in the US Constitution. The prohibition of discrimination in Article 21 of the Charter is also more inclusive than most with its specific references to disability, age, and sexual orientation. For all these reasons, we would naturally wish for the guarantees of the Charter to be applicable as widely as possible.

As we have outlined above, at the present time, the Charter is binding primarily on the institutions of the European Union themselves. The Member States and their various institutions and bodies are bound only if and when they are implementing EU law.³¹² Within their own sphere of authority, the Member States remain accountable under their

312. See Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 *EUR. CONST. L. REV.* 3, 375-403 (2012); Allan Rosas, *When is the EU Charter of Fundamental Rights applicable at national level?*, 19 *JURISPRUDENCE* 4, 1271 (2012).

own constitutional provisions, as well as the European Convention. However, to the extent the Charter might provide substantially better protection, the Member States are not bound by it when adopting or implementing their own law outside of the sphere of application of EU law. This begs the question whether we should argue and hope for a reform, however accomplished, that would “secure to everyone” in the EU at all times “the rights and freedoms” provided in the Charter,³¹³ regardless whether they are confronted with an act or an omission at the local, regional, national, or European level.

On the one hand, EU law already covers or at least touches upon a broad range of subjects, leaving relatively few areas that remain entirely under the control of the Member States.³¹⁴ Thus, one might be tempted to say that an expansion of the application of the Charter to all activities of the Member States would not necessarily be a huge step. This would be a fallacy, however. In particular acts and omissions of the Member States that directly affect the personal rights and freedoms of *their own* citizens, such as the bulk of what is nowadays known as police powers and homeland security, as well as areas including taxation, family matters, and many more, largely remain outside of EU law and, therefore, outside of the area of application of the Charter. Thus, the comprehensive application of the Charter to all acts and omissions of the Member States would invariably generate many additional claims by individuals who are looking for a remedy wherever they may find one, be it the national constitution, the European Convention, or the EU Charter.

On the other hand, the ECJ has been reasonably successful in the management of its caseload and has largely kept the procedural delays to under two years. Thus, it has been spared the traumatic experience

313. The quoted passages are from Article 1 of the European Convention. That provision obligates “*The High Contracting Parties*”. By contrast, the corresponding provision in the Preamble of the Charter stipulates that “*The Union . . . recognizes the rights, freedoms and principles*” set out in the document (emphasis added).

314. Jacques Delors, in 1988, when he was president of the EU Commission, coined the famous phrase that “in ten years 80 per cent of the legislation [of the Member States] related to economics, maybe also taxes and social affairs, will be of Community origin.” See Annette Elisabeth Toeller, *Claims that 80 per cent of Laws Adopted in the EU Member States Originate in Brussels Actually Tell Us Very Little About the Impact of EU Policy-Making*, LSE (2012), <http://blogs.lse.ac.uk/europpblog/2012/06/13/europeanization-of-public-policy/>. A study of Member State legislation adopted between 2002 and 2005 found more differentiated numbers: 81.3% of national environmental policy was determined by EU law, but only 12.9% of homeland security measures and around 40% of economic legislation, for an overall average closer to 50%. See *Das Ende vom Mythos 80 Prozent*, DIE ZEIT (Jun. 4, 2009), <http://www.zeit.de/online/2009/24/studie-eu-gesetze-deutschland>.

of the ECtHR, in particular after the accession of the Central and Eastern European countries in 2004 and 2007. Thus, one might be tempted to say that the ECJ, the final arbiter of EU law and its interpretation, is better able to handle cases coming from the Member States than the ECtHR and should not shy away from a larger role in the protection of human rights. After all, this argument might go, there are no direct complaints for individuals to Luxembourg. The ECJ has the national courts as first responders and will only be reached via the preliminary rulings procedure of Article 267 TFEU in cases where the national courts are at their wits end.

Again, such an argument would be a fallacy. In an ideal world, the national courts would indeed carry the vast majority of the burden and bring to the European Court only those cases where a novel problem arises or where an older interpretation of EU law is begging for review. The reality is quite different, however. Not unlike the large number of repetitive cases brought to the ECtHR, the ECJ is confronted with its own deluge of unnecessary requests for preliminary rulings. First, there are many requests where the national judges could have found the answer in very similar or identical precedents of the European Court and could have avoided (another) reference, in particular if they would have researched also those cases that were previously brought from other Member States. Second, in many cases the national judges could have come up with a reasonable interpretation of EU law of their own by researching more broadly the values and principles already developed in EU statutory and case law. Instead, they often find it easier to ship their files to Luxembourg, where the ECJ, if truth be told, has neither the capacity nor the legitimacy to handle too many of these avoidable procedures.

In the final analysis, we would argue that an expansion of the scope of application of the EU Charter to all acts and omissions of the Member States would largely risk a replication of the problems at the European Court of Human Rights, namely a flood going to the European Court of Justice that would overwhelm the institution in quantitative terms and subsequently lead to a decline in qualitative terms, both in the output of the Court and in the national compliance.

VI. CONCLUSION

Having described and compared the strengths and weaknesses of human rights protection under the European Convention on Human Rights and Fundamental Freedoms and under the EU Charter on Fundamental Rights, we hope that we were able to demonstrate that the success enjoyed by the European Court of Justice is not built on any particular internal procedures or reforms but on the cooptation of the national judges via the preliminary rulings procedure. In much the same way, any reforms of the inner workings of the European Court of Human Rights, whether they involve single-judge procedures, pilot judgments, or any other efforts at streamlining the work, will have their narrow limits. Without a qualitatively different collaboration by the first responders in the Contracting Parties, i.e. the national legislatures, executives, and judiciaries, any internal measures in Strasbourg can only bring temporary relief and will not deliver the ultimate result, namely a focus at the supranational level on the truly novel and important questions. Along the same lines, the ECJ in Luxembourg needs to resist mission creep, and the EU Member States, in particular the newer ones, need to strengthen the capacity at the national level so that we may all be able to continue to enjoy the full benefits of the preliminary rulings procedure.

